CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946-47

No. 1076 46

INTERNATIONAL SALT COMPANY, INCORPORATED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 1208 62

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, INCORPORATED

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED FEBRUARY 28, 1947—APRIL 4, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1076

INTERNATIONAL SALT COMPANY, INCORPORATED, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 1208

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, INCORPORATED

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Southern District of New York	1	1
Praecipe for transcript of record—Appeal of International Salt Co.	2	1
Docket entries (omitted in printing)	6	
Summons	7	2
Complaint	9	3
Exhibit "A"—Form of lease agreement—Lixator	19	11
Exhibit "B"—Form of lease agreement—Saltomat	21	12
Answer	24	14
Plaintiff's request for admissions	33	20
Exhibit 1—List of lease agreements that vary in terms from printed form of lease agreement—Lixator	35	21
Photostatic copies of 50 lease agreements (omitted in printing)	36	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1947.

—1009

	Original	Print
Record from D. C. U. S. Southern District of New York—Continued		
Defendants' admissions	93	23
Notice of motion for summary judgment	95	24
Motion of summary judgment	96	24
Stipulation dismissing complaint as to defendants Edward L. Fuller and Hervey J. Osborn	98	25
Opinion, Rifkind, J.	100	25
Judgment	117	36
Assignments of error—International Salt Co.	123	39
Petition for appeal—International Salt Co.	127	42
Order allowing appeal—International Salt Co.	129	42
Citation and service (omitted in printing)	131	
Clerk's certificate (omitted in printing)	133	
Praecipe for transcript of record—Appeal of United States of America	135	43
Petition for appeal—United States of America	141	44
Assignment of errors—United States of America	142	45
Order allowing appeal—United States of America	144	46
Citation and service (omitted in printing)	145	
Clerk's certificate (omitted in printing)	147	
Statement of points to be relied upon and designation of record—International Salt Co.	148	47
Stipulation as to printing of record	150	47
Statement of points to be relied upon and designation of record—United States of America	153	48
Order noting probable jurisdiction	156	50

[fols. 1-2]

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

Civil No. 32-310

UNITED STATES OF AMERICA, Plaintiff,

vs.

INTERNATIONAL SALT COMPANY, INCORPORATED, et al., Defendants

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court of the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled case, and to include in such transcript the following papers and exhibits:

A: DOCKET ENTRIES

1. The summons, dated July 26th, 1945;
2. The complaint and exhibits thereto annexed, dated July 26th, 1945;
3. Answer, dated September 14th, 1945;
4. The plaintiff's request for admissions under Rule 36, dated May 21, 1946, together with all exhibits thereto annexed;
5. The defendants' notice of admissions pursuant to Rule 36;
6. The notice of motion and the motion for summary judgment, each dated July 2nd, 1946;
7. The opinion of the Honorable Simon H. Rifkind, filed November 20th, 1946;
8. The final judgment, entered December 27th, 1946;

[fol. 3] 9. Consent to dismissal of the complaint without prejudice as to defendants Edward L. Fuller and Harvey J. Osborn, dated January 17th, 1947;

10. The petition for appeal herein, dated January 22, 1947;
11. The appellant's assignment of errors;

12. The statement as to the jurisdiction of the Supreme Court to review the judgment in question, filed pursuant to Rule 12(1) of the Rules of the Supreme Court;

13. The order allowing appeal;

14. The citation on appeal, dated January 23, 1947, directed to the United States of America, with proof of service thereof;

15. The statement directing attention of the appellee to the provisions of Rule 12(3) of the Rules of the Supreme Court, together with proof of service thereof and proof of service of a copy of a petition for appeal, the order allowing appeal, the assignments of errors and the statement as to the jurisdiction of the United States Supreme Court to review the judgment in question;

[fols. 4-6] 16. This praecipe, and proof of service.

17. Clerk's certificate.

Dated: January 28, 1947.

Putney, Twombly, Hall & Skidmore, by (S.) Lemuel Skidmore, Attorneys for Defendant Appellant International Salt Company, Incorporated.

[fols. 7-8] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Lawrence S. Apsey, Spec. Ass't to the Att'y Gen'l.; Maurice Godin, Spec. Att'y., plaintiff's attorney's whose address Dept. of Justice, Antitrust Division, 30 Broad Street, New York, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Signed) George J. H. Follmer, Clerk of Court, by ——, Deputy Clerk. (Seal of Court)

Date: 7/26/45.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 32-310

UNITED STATES OF AMERICA, Plaintiff

v.

INTERNATIONAL SALT COMPANY, INCORPORATED, EDWARD L. FULLER and HERVEY J. OSBORN, Defendants

COMPLAINT—Filed July 26, 1945

[File endorsement omitted]

[fol. 10] The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, complains and alleges upon information and belief:

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Antitrust Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended, commonly known as the Clayton Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act, and of Section 3 of the Clayton Act.

2. The defendants maintain executive offices and transact business within the Southern District of New York. The violations of law hereinafter described have been and are being carried out in part within the Southern District of New York.

[fol. 11]

II

Defendants

3. The International Salt Company, Incorporated (hereinafter sometimes referred to as International Salt), a cor-

poration organized and existing under the laws of the State of New Jersey, with its executive offices at 475 Fifth Avenue, New York, New York, is made a defendant herein. International Salt is the largest producer of salt for industrial and domestic uses in the United States.

4. Edward L. Fuller, who is and was at all times hereinafter mentioned president and a member of the board of directors of International Salt, is made a defendant herein.

5. Hervey J. Osborn, who is and was at all times hereinafter mentioned executive vice president and secretary, and a member of the board of directors of International Salt, is made a defendant herein.

III

Nature of Trade and Commerce

6. The defendant International Salt is engaged in the business of manufacturing and supplying salt for industrial, agricultural, medicinal and home purposes. It is also engaged in the manufacture and distribution of a machine known as the Lixate Process Dissolver (hereinafter sometimes referred to as the Lixator), which is manufactured or claimed to be manufactured by defendant International Salt under U. S. patent No. 2,281,140, granted on April 28, 1942 and now owned by said defendant. Defendant International Salt is also engaged in the manufacture and distribution of a machine known as the Saltomat Automatic Salt Depositor (hereinafter sometimes referred to as the Saltomat), which is manufactured or claimed to be manufactured by said defendant under U. S. patent No. 2,308,189, granted on January 12, 1943, and now owned by said defendant.

[fol. 12] 7. The aforesaid Lixator dissolves rock salt, a raw material sold by defendant International Salt and other companies, into a salt brine solution. This brine is an essential part of the manufacturing processes of many industries, as, for example, the meat packing, refrigeration, tanning, canning, dyeing, soap making, steel, laundry, etc. industries.

8. The aforesaid Saltomat is used as a dispenser of salt tablets by persons in factories, offices and homes where the

heat is intense. These salt tablets, sold by defendant International Salt and other companies, serve to replace some of the salt lost by the body through perspiration because of heat.

9. Defendant International Salt manufactures the above machines and rock salt and salt tablets suitable for use therein, at plants located in New York, Michigan and Louisiana and ships in interstate commerce large quantities of its said machines, rock salt and salt tablets made in those plants to customers throughout the United States. In 1944, defendant International Salt sold and shipped in interstate commerce approximately 119,000 tons of salt having a value of approximately $500,000 to be used in connection with the aforesaid Lixator and Saltomat. Salt of the same kind and quality as that made and sold by the defendant International Salt, which is equally suitable for use in said Lixator and Saltomat, is and has been during all the times hereinafter mentioned, made, sold and shipped in interstate commerce by other salt companies in competition with the salt and salt tablets made and sold by the defendant International Salt.

IV

Unlawful Contracts

10. The defendants have continuously, during all the times herein mentioned, brought about, entered into and [fol. 13] maintained the illegal agreements hereinafter alleged, in restraint of the above described trade and commerce in rock salt and salt tablets among the several states of the United States, in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, all as hereinafter set forth. The said restraint and the performance of the unlawful agreements hereinafter alleged are continuing and will continue unless the relief prayed for in this complaint is granted.

11. The defendants now are and have been for the past three years engaged in making and entering into lease agreements with various persons, at present more than 750, for the use of said Lixator, on a printed form, a copy of which is attached hereto as Exhibit A, and made a part hereof as though fully set forth herein. The defendants likewise are now and have been for the past two years en-

gaged in making and entering into lease agreements with various persons, at present approximately 100, for the use of the aforesaid Saltomat, on a printed form, a copy of which is attached hereto as Exhibit B with the same force and effect as though fully set forth herein.

12. The said form of lease agreement, Exhibit A, under which the use of the Lixator is and has been leased by the defendants to various persons as aforesaid, contains the following provisions, among others:

(a) In consideration of the rental to be paid by the lessee, defendant International Salt leases the Lixator to the named lessee for a term of five years, and thereafter from year to year at the nominal rental of $1 per year. The said lease is of indefinite term and duration.

(b) It is mutually agreed "that the said LIXATE Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon".

[fol. 14] (c) "If, at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said LIXATE Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

(d) If the Lessee "shall at any time discontinue purchasing its requirements of salt from said Lessor . . . said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said LIXATE Process Dissolver from the possession of said Lessee."

13. The said form of lease agreement, Exhibit B, under which the use of the Saltomat is and has been leased by the

defendants to various persons as aforesaid, contains the following provisions, among others:

(a) In consideration of the yearly rental to be paid by the Lessee, defendant International Salt leases the Saltomat to the named Lessee. The said lease is of indefinite term and duration.

(b) It is mutually agreed "that the said Salt Tablet Depositor (s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor (s) at prices and upon terms and conditions hereinafter agreed upon."

[fol. 15] (c) The only provision in the lease agreement for any reduction in the price of lessor's salt tablets is as follows: "If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor (s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

(d) If the Lessee should "at any time discontinue purchasing its requirements of Salt Tablets for Salt Tablet Depositor (s) from said Lessor, or its agent, . . . said Lessor shall have the right, upon ten days' written notice of intention to do so, to remove the said Salt Tablet Depositor (s) from the premises and/or possession of said Lessee."

14. The aforesaid lease agreements have been carried out in all respects and are now in full force and effect.

15. The rock salt and salt tablets made and sold by defendant International Salt for use in the aforesaid Lixator and Saltomat are unpatented articles.

16. The defendants have refused to grant licenses or other rights to other persons to manufacture or sell said Lixator or Saltomat and have refused to sell such machines or lease them free of the aforesaid restrictions.

17. In bringing about, maintaining and carrying out the aforesaid agreements with various persons, the defendants intended to, and did lessen competition in the sale of salt

and salt tablets for use in said Lixate Process Dissolver and Saltomat.

18. In bringing about, maintaining and carrying out the aforesaid agreements the defendants intended to and did prevent other manufacturers of salt and salt tablets suitable for use in said Lixator or Saltomat from selling their products to users of said machines in competition with defendant International Salt.

[fol. 16] 19. In bringing about, maintaining and carrying out the aforesaid agreements the defendants intended to and did prevent the users of said Lixator and Saltomat from purchasing salt and salt tablets suitable for use therein from any company except the defendant, International Salt, and on any prices or terms except those fixed by defendant, International Salt.

20. In bringing about, maintaining and carrying out the aforesaid agreements the defendants intended to and did suppress and restrain competition in the sale of salt and salt tablets by tying the use of the said unpatented, raw materials to the use of the aforesaid patented machines, which said tying agreements are in violation of Section 1 of the Sherman Antitrust Act and Section 3 of the Clayton Act.

21. The defendants Edward L. Fuller and Hervey J. Osborn have authorized, ordered or done some or all of the acts of defendant, International Salt, constituting the offenses herein complained of.

V

Effects of the Unlawful Contracts

22. Defendants by the aforesaid restrictive leases have substantially lessened competition in the sale of salt, rock salt and salt tablets to the aforesaid Lessees of Lixators and Saltomats. In 1944 the defendant, International Salt, sold approximately 119,000 tons of salt having a value of approximately $500,000 for use in said machines and by the aforesaid restrictive leases, the defendants have prevented all competition in the sale of salt for such use.

23. The illegal practices herein described have continued during the period of time herein mentioned and are continuing.

24. The effects of the said practices have not been dissipated but are continuing. Such effects will continue until competitive supply of salt to the aforesaid Lessees is restored and defendant's monopoly thereof brought to an end.

25. Lessees of the aforesaid machinery have already paid to defendant, in the form of initial rental, most if not all of [fol. 17] the reasonable cash value of said machinery, excluding from valuation thereof returns to defendants from the supply of salt to the Lessees. The said Lessees have been led to rely upon possession of the said machinery in the conduct of their business, which said machinery was made available to them in return for such initial rentals and in return for giving to defendant a monopoly in supply of salt to such Lessees. The effects of defendant's improper practices and its monopolistic position supported thereby would be aggravated if defendant should now remove all machinery from possession of said Lessees or should compel them to pay a second time the value thereof, or if the patents used by defendant to support its monopoly should, until competitive conditions are restored, be enforced against other consumers of salt who are not now Lessees from defendant.

Prayer

Wherefore, Plaintiff demands judgment as follows:

(1) That the aforesaid form lease agreements be adjudged and decreed unlawful and in violation of the Sherman Antitrust Act and the Clayton Act;

(2) That observances of the aforesaid tying clause in the form lease agreements alleged be perpetually enjoined;

(3) That the defendants and the officers, directors, agents, representatives of, and all persons and corporations acting or claiming to act on behalf of defendant International Salt, be perpetually enjoined from participating in, maintaining or carrying out the restrictions in the aforesaid form lease agreements, or from reviving or renewing the same, or from granting or claiming any rights giving effect thereto;

(4) That defendant International Salt, its officers, directors, agents, representatives and all persons and corporations acting or claiming to act on its behalf, be required to lease or sell to present Lessees the machines now

under lease to them at reasonable rental or price, with credit to each Lessee for all amounts already paid by it [fol. 18] for use of the machinery in excess of the reasonable cash value of the rental thereof and without attributing any value to the patents or to the supply of salt for use with such machinery;

(5) That the defendant International Salt, its officers, directors, agents, representatives, and all persons acting or claiming to act on behalf of International Salt, be enjoined from instituting or maintaining any action or other legal proceedings for the infringement of the patents hereinbefore referred to.

(6) That pursuant to Section 5 of the Sherman Antitrust Act, an order be made and entered herein requiring such of the defendants as are not within this District to be brought before the Court in this proceeding as parties defendant and directing the marshals of the districts in which they severally reside to serve summons upon them;

(7) That plaintiff have such other and further relief as the nature of the case may require and the Court may deem proper in the premises and that plaintiff recover the costs of this suit.

Dated: New York, New York, July 26, 1945.

(S.) Maurice Godin, Special Attorney.

(S.) Tom C. Clark, Attorney General. (S.) Wendell Berge, Assistant Attorney General. (S.) Herbert A. Berman, Special Assistant to the Attorney General. (S.) Lawrence S. Apsey, Special Assistant to the Attorney General. (S.) John F. X. McGohey, United States Attorney.

[fol. 19] EXHIBIT "A" TO COMPLAINT

Lease

.....

THIS INDENTURE, made this —— day of ——— 19—— between International Salt Company, Inc., of Scranton, Pa., hereinafter called the Lessor, and ..... of ..... hereinafter called the Lessee.

.....

WITNESSETH: That for and in consideration of the sum ——— Dollars, ($——) per year, payable yearly in advance for five years, said Lessor hereby leases to said Lessee one ——— inch diameter Lixate* Process Dissolver. After expiration of the said five year period the rental to be paid by said Lessee shall be at the rate of One Dollar ($1.00) per year.

It is mutually agreed the transportation charges on the Lixate* Process Dissolver from Detroit, Michigan, to destination are for the Lessee's account and are in addition to the rental basis mentioned herein.

It is further mutually agreed that the said Lixate* Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate* Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate* Process Dissolver shall be made, said Lessee [fol. 20] shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price.

It is further mutually agreed: that the said Lixate* Process Dissolver is and shall continue to be the exclusive property of said Lessor and can not be sold, loaned or otherwise transferred to any other person or corporation without the written consent of said Lessor; that should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said Lixate* Process Dissolver from the possession of said Lessee.

In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written.

Without Hopper.
With Hopper.

International Salt Company, Inc., Lessor, By ——
——, Lessee, By —— ——.

[fol. 21] EXHIBIT "B" TO COMPLAINT

International Salt Company, Incorporated

Scranton, Pa.

Lease

Memorandum of Agreement entered into this — day of —, 19— by and between International Salt Company, Inc., a corporation of the State of New Jersey (hereinafter called the Lessor), and —— —— (hereinafter called the Lessee):

Witnesseth: That for and in consideration of the sum of —— Dollars ($——) per year, payable yearly in advance, for one year or part thereof, said Lessor hereby leases to said Lessee Saltomat Automatic Salt Tablet Depositor(s), described as follows:

It is mutually agreed that the said Salt Tablet Depositor(s) is (are) to be delivered F. O. B. Lessee's Railroad Station, charges prepaid.

It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good con-

*Reg. U. S. Pat. Off.

dition during the term of this lease: that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided:

If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price.

It is further mutually agreed that Lessor shall be under no liability to anyone for injury resulting from said machine or the use thereof while it is in Lessee's custody or possession, and the Lessee agrees to hold Lessor harmless from any such claim of liability and all expense resulting therefrom or in connection therewith; that the said Salt [fols. 22-23] Tablet Depositor(s) is (are) and shall continue to be the exclusive property of said Lessor and cannot be sold, loaned or otherwise transferred to any person or corporation without the written consent of said Lessor; that should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon ten days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee.

In Witness Whereof, the parties have hereunto set their hands and seals, the day and year first above written.

International Salt Company, Inc., Lessor, by ——
——. —— ——, by —— ——, Lessee.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed September 17, 1945

Defendants, answering the complaint herein by Putney, Twombly, Hall & Skidmore, their attorneys,

1. Deny any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 1 of said complaint.

2. Deny each and very allegation contained in paragraph 2 of said complaint, except that they admit that the defendants maintain executive offices and transact business within the Southern District of New York.

3. Deny each and every allegation contained in paragraph 3 of said complaint, except that they admit that defendant, International Salt Company, Incorporated, is a corporation organized and existing under the laws of the State of New Jersey, with executive offices at 475 Fifth Avenue, New York, N. Y., and that said defendant is the largest producer of salt for industrial uses in the United States.

4. Deny each and every allegation contained in paragraph 6 of said complaint, except that they admit that defendant, International Salt, is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes and that it is also engaged in the manufacture and distribution of a machine known as the Lixate Process Dissolver, which is manufactured by defendant, [fol. 25] International Salt under United States patents now owned by defendant; and except that they further admit that defendant, International Salt, is engaged in the distribution of a machine known as the Saltomat Automatic Salt Depositor, which is manufactured under a United States patent granted on January 12, 1943, and now owned by said defendant.

5. Deny each and every allegation contained in paragraph 8 of said complaint.

6. Deny each and every allegation contained in paragraph 9 of said complaint, except that they admit that defendant,

International Salt, manufactures the Lixate Process Dissolver and rock salt suitable for use in said machine and salt tablets suitable for use in the Saltomat Automatic Salt Depositor at plants located in New York, Michigan and Louisiana, and ships in interstate commerce machines, rock salt and salt tablets so manufactured to customers in other States of the United St tes; and except that they further admit that salt in many respects similar to that made and sold by defendant, International Salt, is and has been during the times mentioned in the complaint made, sold and shipped in interstate commerce by other salt companies in competition with the salt and salt tablets made and sold by defendant, International Salt.

7. Deny each and every allegation contained in paragraph 10 of said complaint.

8. Deny each and every allegation contained in paragraph 11 of said complaint, except that they admit that defendant, International Salt, now is and has been for the past three years engaged in making and entering into lease agreements with various persons for the use of said Lixator, some of them on a printed form, a copy of which is attached to the complaint and marked "Exhibit A", and that the total number of leases of said Lixator now outstanding is more than 750, and except that they further admit that [fol. 26] defendant, International Salt is, now and has been for the past two years engaged in making and entering into such agreements with various persons for the use of the Saltomat, some of them on a printed form, copy of which is attached to the complaint and marked "Exhibit B", and that the total number of leases of said Saltomat now outstanding is approximately 100.

9. Deny each and every allegation contained in paragraph 12 of said complaint, except that they admit that defendant, International Salt, has during the past three years entered into agreements for the lease of the Lixator in the form attached to said complaint, marked "Exhibit A", to which form of agreement defendants beg leave to refer for the terms thereof.

10. Deny each and every allegation contained in paragraph 13 of said complaint, except that they admit that defendant, International Salt, has during the past three years entered into agreements for the lease of the Saltomat

in the form attached to said complaint, marked "Exhibit B", to which form of agreement defendants beg leave to refer for the terms thereof.

11. Deny each and every allegation contained in paragraph 14 of said complaint, except that they admit that lease agreements in the form of Exhibit A annexed to said complaint and in the form of Exhibit B annexed to said complaint, are now in effect.

12. Deny each and every allegation contained in paragraph 16 of said complaint, except that they admit that defendant, International Salt, has in some instances refused to sell the machines described as Lixator and Saltomat.

13. Deny each and every allegation contained in paragraphs 17, 18, 19, 20 and 21 of said complaint.

[fol. 27] 14. Deny each and every allegation contained in paragraph 22 of said complaint, except that they admit that in 1944, defendant, International Salt, sold approximately 119,000 tons of salt having an approximate value of $500,000, for use in said Lixator and Saltomat machines.

15. Deny each and every allegation contained in paragraphs 23, 24 and 25 of said complaint.

For an Affirmative Defense, Defendants Allege:

16. That the defendants in entering into agreements for the lease of the Lixator and Saltomat on the lease forms, copies of which are attached to the complaint, marked Exhibit A and Exhibit B respectively, had no purpose or intent to create a monopoly in the sale of rock salt or salt tablets or to restrain trade and commerce in such rock salt and salt tablets, but only to secure for defendant, International Salt Company, Inc., the opportunity to meet competitive prices in such rock salt and salt tablets, and the making of such leases did not in fact result in creating any monopoly or restraining trade or commerce in such products.

17. The defendant, International Salt Company, Inc., has in many instances during the period mentioned in the complaint sold Lixators outright where a customer has objected to leasing such machine, and without any restrictions whatsoever on the source from which the rock salt for use in such Lixator was to be purchased. In no case, as defend-

ants are informed and believe, has any of the defendants at any time refused to install a Lixator or Saltomat, because the customer objected to signing a lease on one of the printed forms, copies of which are annexed to the complaint, marked Exhibits A and B respectively. Moreover, in many instances lessees of the Lixator and of the Saltomat have purchased rock salt and salt tablets for use in such Lixator or Saltomat respectively from sources other than the defendant, International Salt Company, Inc., to the [fol. 28] knowledge of the defendants, and in no such instance have the defendants or any them removed, or attempted to remove or threatened to remove the machine from the possession of such lessee.

18. That by leasing the said machines rather than selling them outright, defendant, International Salt Company, Inc., is enabled to require the machine to be kept in good order and repair by the lessee and to have the machine inspected from time to time by its qualified engineer to determine its condition and whether it is functioning properly, thereby insuring to the customer a satisfactory operation of the machine and protecting the good-will of said defendant with said customer and with the trade.

19. That said Lixators are used by the lessees for the purpose of making brine from rock salt through a process owned and promoted by the defendant, International Salt Company, Inc., known as the "Lixate Process." In using such process it is of extreme importance that rock salt be used of a standard and uniform chemical analysis in order to assure a constant and dependable supply of brine of uniform quality and concentration. The rock salt produced at the mines of the defendant, International Salt Company, Inc., is produced after careful investigation of the salt deposit prior to the actual mining, so as to guarantee a grade of salt consistently high in sodium chloride content, with the result that the rock salt produced from said defendant's mines has an average sodium chloride content of 98.2% or higher. Defendants are informed and believe that the rock salt produced by other mining concerns does not run consistent in sodium chloride content and in many instances runs as low as 95% of sodium chloride. Rock salt of a lower sodium chloride content contains a greater amount of insoluble impurities which must be disposed of through the sludge disposal of the Lixator using defendant's Lixate

[fol. 29] Process. In distributing its Lixators, defendant, International Salt Company, Inc., advises its lessees as to certain fixed intervals at which the sludge disposal should be operated, these intervals being based on the chemical content and analysis of the rock salt produced by said defendant. If another salt with a lower sodium chloride content and with more impurities is used in such Lixator, it will require an alteration in the control of the sludge disposal, if the Lixator is to operate in a satisfactory manner. Moreover, the use of such impure salt will affect adversely the amount of concentrated brine produced by the Lixator. The successful operation of the Lixator, therefore, and of the defendant's Lixate Process used in producing brine from such machine is dependent on the use of rock salt produced by the defendant, International Salt Company, Inc., with its high sodium chloride content and fewer impurities.

20. The Saltomat machines distributed by the defendant, International Salt Company, Inc., as alleged in the complaint, are used to inject salt in specific and uniform quantities into canned products during the process of canning, the salt being put into the Saltomat machine in the form of salt tablets. The salt tablets manufactured by the defendant, International Salt Company, Inc., are manufactured from high purity evaporated salt made especially to meet the requirements of the canning industry. They contain, for instance, a minimum of calcium sulphate, an impurity which, when used in the processing of vegetables such as peas and beans, causes a hardening of the skin of the vegetable which is very objectionable to the consumer. Defendants are informed and believe that users of Saltomat machines distributed by defendant, International Salt Com- [fol. 30] pany, Inc., have a more successful experience with said machine if they use tablets made by defendant, International Salt Company, Inc., from salt produced by it which contains a minimum of impurities and is especially designed to meet the specifications of the canning industry.

21. Furthermore, in many instances where a stock of salt tablets is carried over by a customer from one canning season to the next, humidity in the storage warehouse will cause the tablets partially to dissolve or to become moist. Those next to the shipping containers in that event will adhere to the side of the container and unless protected

by a proper coating will pick up impurities such as small pieces of paper from the container. Defendant, International Salt Company, Inc., has overcome this problem by having the containers for its salt tablets made with a glazed interior surface so that the tendency of the salt tablets when moist to adhere to the side of the container has been practically eliminated.

22. Where salt tablets, not produced by defendant, International Salt Company, Inc., and containing impurities or foreign matter from the sides of the container, are used in a Saltomat machine, such impurities and foreign matter are introduced into the canned products in which the salt tablets are deposited, to the detriment of such products and this condition is normally not discovered until after the cans are opened by the ultimate consumer, at which time it is impossible for the canner to tell what salt tablets were used in the particular can. In such cases the blame will be attached to the defendant's machine with a corresponding loss of goodwill on the part of the defendant, International Salt Company, Inc.

23. The making of leases of the Lixator and Saltomat on the printed forms, copies of which are annexed to the com- [fols. 31-32] plaint, marked Exhibits A and B respectively, is valid and legal and does not violate any of the statutes mentioned in the complaint and is necessary for insuring the satisfactory operation of said machines by said defendant's customers and for the protection of the good will of the defendant, Internation Salt Company, Inc., with such customers, and with the trade in general.

Wherefore, defendants demand judgment against plaintiff dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, N. Y., September 14, 1945.

Putney, Twombly, Hall & Skidmore, By Lemuel Skidmore, Attorneys for Defendant.

[fol. 33] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

REQUEST FOR ADMISSIONS UNDER RULE 36 OF THE RULES OF CIVIL PROCEDURE—Filed May 22, 1946

The United States of America, plaintiff herein, by its attorneys, requests the defendant International Salt Company, Incorporated (referred to herein and in the complaint as International Salt) to make the following admissions for the purpose of this action only and subject to all pertinent objections which may be interposed at the trial.

I. That each of the following statements is true:

1. Defendant International Salt manufactures or claims to manufacture the Lixate Process Dissolver (referred to herein and in the complaint as the Lixator) under United States Letters Patent No. 1.892,333 (issued December 27, 1932) and No. 1.928.008 (issued September 26, 1933).

2. Defendant International Salt manufactures or claims to manufacture the Saltomat Automatic Salt Depositor (referred to herein and in the complaint as the Saltomat) under United States Letters Patent No. 2.308.188 (issued January 12, 1943).

3. Defendant International Salt has entered into and now has in full force and effect, 840 lease contracts relating to the Lixate Process Dissolver, each lease covering one such Lixator. 790 of said lease contracts were entered into on the printed form of lease contract attached to the complaint [fol. 34] as Exhibit A. 50 of said lease contracts vary in terms from the said printed form of lease contract; a true and correct copy of each of said 50 leases, together with a list showing the name of and the location of each lessee is attached hereto as Exhibit 1.

4. Defendant International Salt has entered into and now has in full force and effect, 73 lease contracts covering 96 Saltomats. Each of said lease contracts was entered into

on the printed form of lease agreement attached to the complaint as "Exhibit B."

Dated, May 21, 1946.

(S.) Robert C. Barnard, Special Assistant to the Attorney General.

(S.) J. C. Wilson, Special Assistant to the Attorney General.

Service of the foregoing Request for Admissions under Rule 36 is acknowledged and a copy received this 21 day of May, 1946

(S.) Putney, Twombly, Hall & Skidmore, Attorneys for International Salt Company, Incorporated.

[fols. 35-92] EXHIBIT I TO REQUEST

List of Leases of Lixate Process Dissolvers from International Salt Company as Lessor, To:

Name of Lessee	Lease Dated
1. Rosemary Manufacturing Company	March 2, 1942
2. New Braunfels Textile Mills	February 12, 1941
3. Sidney Blumenthal & Co. Inc	November 4, 1941
4. Laclede Packing Company	July 10, 1941
5. Lunchburg Hosiery Mills, Inc	October 10, 1940
6. Georgia Packing Company	March 18, 1943
7. American Cyanamid & Chemical Corporation	January 9, 1942
8. Original Fur Products Corp.	July 17, 1945
9. Schuster Woolen Co.	May 20, 1940
10. Sheffield Farms Co., Inc.	February 19, 1942
11. The Tobin Packing Co., Inc.	January 9, 1939
12. Armour and Company	January 20, 1939
13. Roegelein Packing Co. Inc.	July 8, 1942
14. Gregg Dyeing Company	December 28, 1936
15. American Finishing Company	May 19, 1941
16. Dyersburg Cotton Products, Inc.	April 21, 1937
17. A. C. Lawrence Leather Co.	September 25, 1942
18. A. C. Lawrence Leather Co.	October 2, 1942
19. A. C. Lawrence Leather Co.	April 12, 1944
20. Winslow Bros. & Smith Co.	April 24, 1942

Name of Lessee	Lease Dated
21. Salem Oil & Grease Company	March 6, 1945
22. Consolidated Laundries Corporation	March 15, 1940
23. American Finishing Company	November 8, 1939
24. Armour and Company	May 10, 1937
25. Armour and Company	April 23, 1941
26. Armour Fertilizer Works	July 17, 1941
27. Armour and Company	April 18, 1945
28. Consolidated Laundries Corporation	November 6, 1941
29. E. F. Houghton & Co.	January 25, 1937
30. Kreinberg & Krasny, Inc.	May 17, 1937
31. Krey Packing Co.	July 12, 1938
32. A. C. Lawrence Leather Co.	August 28, 1939
33. The H. H. Meyer Packing Co.	July 1, 1938
34. National Laundry	January 12, 1940
35. Board of Public Affairs (Versailles, Ohio)	February 16, 1937
36. The Rath Packing Co.	July 1, 1938
37. The Rath Packing Co.	July 1, 1938
38. Riverside Packing Co. Inc.	August 7, 1937
39. Sea Foam Laundry, Inc.	January 4, 1943
40. Southern Shell Fish Company, Inc.	March 31, 1936
41. Southern Shell Fish Company, Inc.	August 21, 1935
42. Snider Packing Corporation	May 28, 1941
43. The Sperry & Barnes Co.	July 7, 1941
44. The Sibley Manfg. Co.	March 23, 1936
45. West Kittanning Borough	December 5, 1941
46. The Neil House	June 15, 1936
47. Riverside & Dan River Cotton Mills, Inc.	September 12, 1941
48. Phoenix Mills	July 14, 1943
49. Mooresville Cotton Mills	January 9, 1945
50. Chatham Manufacturing Company	December 10, 1943

[fols. 93-94] [File endorsement omitted]

IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

Civil No. 32-310

[Title omitted]

DEFENDANTS' ADMISSIONS—Filed June 10, 1946

SIRS:

Please Take Notice that the defendants in the above-entitled action hereby admit the allegations contained in Paragraphs No. 1, No. 3 and No. 4 of plaintiff's request for admissions under Rule 36 of the Rules of Civil Procedure, dated May 21, 1946.

Defendants deny the allegation contained in Paragraph No. 2 thereof, except that they admit that the defendant, International Salt Company, Incorporated, causes to be manufactured the Saltomat Automatic Salt Depositor under U. S. Letters Patent No. 2308188 issued January 12, 1943.

The foregoing admissions are made by defendants pursuant to the provisions of Rule 36 of the Rules of Civil Procedure and for the purpose of this action only.

Yours, etc., Putney, Twombly, Hall & Skidmore, by Lemuel Skidmore, Attorneys for Defendants, Office and Post Office Address: 165 Broadway, Borough of Manhattan, New York City.

To: Lawrence S. Apsey, Esq., Special Assistant to the Attorney-General, Maurice Godin, Esq., Special Attorney, 30 Broad Street, New York, N. Y.

[fol. 95] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION FOR SUMMARY JUDGMENT—Filed November 21, 1946

To: Putney, Twombly, Hall & Skidmore, 165 Broadway, New York 6, New York.

Please take notice that on the 30th day of July 1946, at 10:30 o'clock or as soon thereafter as counsel can be heard, the United States of America, plaintiff, will bring the annexed motion for summary judgment on for hearing before this Court at Room 506, United States Court House, Foley Square, New York, New York.

(S.) Robert C. Barnard, Special Assistant to the Attorney General.

(S.) Wendell Berge, Assistant Attorney General. (S.) J. C. Wilson, Special Assistant to the Attorney General.

Dated: July 2, 1946.

Service acknowledged and copy received this —day of July, 1946.

Putney, Twombly, Hall and Skidmore, Attorneys for Defendant, International Salt. Co., Inc.

[fols. 96-97] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR SUMMARY JUDGMENT

The United States of America, Plaintiff, by its attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for a summary judgment in favor of the United States on the ground that the pleadings and the admissions by the defendant International Salt Company, Incorporated on file in this action establish that there is no genuine issue as to any material fact, and that

on the undisputed facts the United States is entitled as a matter of law to the judgment for which it moves herein.

Dated: July 2, 1946.

(S.) Robert C. Barnard, Special Assistant to the Attorney General.

(S.) Wendell Berge, Assistant Attorney General. (S.) J. C. Wilson, Special Assistant to the Attorney General.

[fols. 98-99] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION DISMISSING COMPLAINT AS TO THE DEFENDANTS EDWARD L. FULLER AND HERVEY J. OSBORN—Filed January 20, 1947

The parties hereby stipulate and agree that the complaint be dismissed without prejudice as to the defendants Edward L. Fuller and Hervey J. Osborn.

(S.) Putney, Twombly, Hall & Skidmore, Attorneys for the Defendants. (S.) James C. Wilson, Special Assistant to the Attorney General.

Date 1/17/47.

[File endorsement omitted.]

[fol. 100] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 32-310

UNITED STATES OF AMERICA, Plaintiff,

against

INTERNATIONAL SALT COMPANY INCOPORATED, et al., Defendants

Appearances:

Robert C. Barnard, Esq., Spec. Asst. to Atty. Gen., Atty. for United States. Wendell Berge, Asst. Atty. Gen. Jas. C. Wilson, Spec. Asst. to Atty. Gen.

Butney, Twombly, Hall & Skidmore, Esqs., Attorneys for Defts. Lemuel Skidmore, Esq., Howard F. Ordman, Esq., of Counsel.

OPINION—Filed November 21, 1946

RIFKIND, J.:

Plaintiff has moved for summary judgment (R. R. C. P., Rule 56; *United States* v. *Associated Press*, S. D. N. Y., 1943, 52 Fed. Supp. 362, aff. 326 U. S. 1) against the corporate defendant only, on the ground that the pleadings and admissions of the defendant show absence of any genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law. No affidavits have been submitted by either party.

[fol. 101] This is a civil action brought pursuant to Sec. 4 of the Sherman Act, 15 U. S. C. A. 4 and Sec. 15 of the Clayton Act, 15 U. S. C. A. 25, to enjoin defendant from carrying out agreements in alleged violation of Sec. 1 of the Sherman Act, 15 U. S. C. A. 1 [1] and Sec. 3 of the Clayton Act, 15 U. S. C. A. 14.[2]

---

[1] The relevant portion of §1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *".

[2] Section 3 of the Clayton Act provides, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agree-

Defendant International Salt Company, Inc. (hereinafter referred to as defendant) is the largest producer of salt for industrial uses in the United States. It is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes. It is also engaged in the manufacture and distribution of a machine known as the "Lixator", which is manufactured by the defendant under patents owned by it. Defendant is also engaged in the distribution of a machine known as the "Saltomat", which defendant causes to be manufactured under a patent owned by it.

The Lixator dissolves rock salt, a raw material sold by defendant and other companies, into a salt brine solution. This brine is an essential part of the manufacturing processes of many industries, such as meat packing, refrigeration, laundering. The Saltomat is a machine used to inject a salt tablet of uniform quantity into canned products during the process of canning.

Defendant's business is interstate. In 1944, defendant sold approximately 119,000 tons of salt, having a value of [fol. 102] approximately $500,000 for use with one or the other of the machines mentioned. Salt in many respects similar to that made and sold by the defendant is and has been sold by other companies in competition with the salt and salt tablets distributed by the defendant.

During the past three years, defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Lixator. There are in effect 840 lease agreements, each lease covering one Lixator machine. Of these 840 leases, 790 were made on the defendant's standard form of agreement. The remaining 50 vary in one or more respects.

The form contract for the Lixator contains a clause which reads as follows:

> "It is further mutually agreed that the said Lixate Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process

---

ment, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, provided:

"If at any time during the term of this lease a general reduction in price of grade of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payments [fol. 103] of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

It further provides as follows:

"Should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirement of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 30 days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

Concerning the 50 Lixator agreements which differ from the printed form, the variations are set forth in the margin.[3]

During the past two years defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Saltomat. There are in effect 73 lease agreements covering 96 Saltomat machines. Each

[3] All but 4 leases contain tying clauses, requiring the purchase of some or all of the rock salt from the lessor. Three leases permit the lessee to buy 50% of its salt requirements from defendant's competitors. Five leases with Armour & Co. provide that Armour & Co. may use salt produced by itself. In most instances the modifications are of little or no importance, for example, variances relating to additional facilities furnished by the lessor, and minor variations in rental terms or cancellation terms.

lease was entered into on defendant's printed form, which likewise contains a clause requiring the lessee to purchase defendant's salt tablets for use in the machine. The text of that clause is as follows:

> "It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from [fol. 104] the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided: If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

The lease further provides:

> "• • • should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 10 days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

The rock salt and salt tablets sold by defendant are unpatented articles.

Defendant denies, and for the purposes of this motion for summary judgment I must accept its denial as fact, that it has refused to grant licenses or other rights to other persons free of the aforesaid restrictions. It admits that it has in some instances refused to sell the machine outright. Defendant, however, asserts in its affirmative defense that it has in some instances sold Lixators outright to customers who objected to leasing the machine, and that in such cases it imposed no restrictions concerning the source from which the rock salt for use in the machine

was to be purchased. The answer also asserts that in no [fol. 105] case has defendant at any time refused to install either a Lixator or a Saltomat machine on the ground that the customer objected to the defendant's restrictions concerning the purchase of salt from the defendant.

This case presents for decision the precise question which the Supreme Court found it unnecessary to decide in *Morton Salt Co. v. G. S. Suppiger Co.*, 1942, 314 U. S. 488, reh. den. 315 U. S. 826. In that case the court allowed a summary judgment dismissing a suit for patent infringement where it appeared that the patent owner had annexed to the patent license an obligation on the part of the licensee to buy from the patent owner unpatented salt tablets for use with the patented dispensing machine. The court said (at page 494):

> "It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity."

Interstitially we find in that opinion the cells from which the decision of the instant case could grow. The court spoke of "making use of [plaintiff's] patent monopoly to restrain competition in the marketing of unpatented articles, salt tablets • • • and • • • aiding in the creation of a limited monopoly in the tablets not within that granted by the patent" (p. 491), and also said that "courts, [fol. 106] and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest" (p. 492). I am unable to bring to mind any public interest which the court could have had in contemplation other than the public interest in the maintenance of a system of free competition. The misconduct which disqualified the plaintiff in the *Morton* case from enforcing his patent right was interference with the system of free competition. True enough the disposition made by the court of the case rendered it unnecessary for it to consider whether the restraint upon trade was undue or unreasonable or whether the lessening

of competition was substantial. But clearly a petty or merely nominal offense against the public interest would hardly justify the court in withholding its aid to the holder of the patent. This reasoning is not dispositive, it nevertheless points a direction. In that direction the court has moved. In *Mercoid Cprp. v. Mid-Continent Investment Co.*, 1944, 320 U. S. 661, the court not only extended the doctrine of the *Morton* case to a contributory infringer, but also used language much more explicitly expressive of its intention to go forward in the direction but faintly suggested by the *Morton* case. It said:

> [fol. 107] "It is the public interest which is dominant in the patent system. (p. 665) • • • The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. (p. 666) • • • The patent is employed to protect the market for a device on which no patent has been granted. But for the patent such restraint on trade would *plainly run afoul of the anti-trust laws.* If the restraint is lawful because of the patent, the patent will have been expanded by contract. • • • Such a vast power 'to multiply monopolies' at the will of the patentee • • • would carve out exceptions to the anti-trust laws which Congress has not sanctioned. (p. 667) • • • Should such a decree [an injunction against infringement] be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and *a violation of the anti-trust laws.* (p. 670)". [Italics supplied.]

True, the *Mercoid* decision was not reached upon a motion for summary judgment, but the facts of record in that case show nothing more than is here admitted on motion.

In the light of these general principles the problem presented by the instant case must be decided. The defendant here urges the impropriety of summary judgment because of the presence of two triable issues, namely, (1) whether the Lixator and Saltomat leases do in fact substantially lessen competition or tend to create a monopoly in salt, and, (2) whether the restraint of trade affected by these leases, if any, is an unreasonable restraint.

This contention is confronted by two possible answers. The first is that the conduct complained of is unlawful *per se*.

> *Fashion Originators Guild of America v. Federal Trade Commission*, C. C. A. 2, 1940, 114 Fed. 2d 80, 85 (footnote (4)), affd. 1941, 312 U. S. 457.

The other is that a restraint which affects 900 business [fol. 108] units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial.

Were it not for *Federal Trade Commission v. Sinclair Refining Co.*, 1923, 261 U. S. 463 and *Pick Mfg. Co. v. General Motors Corp.*, 1936, 299 U. S. 3, aff'g. 80 Fed. 2d 641, I should rest this case on the first answer. In this case, like in the cited cases, the lessees were apparently free to obtain competitive machines and equipment to handle the salt and salt tablets, and thereby be in a position to purchase salt from the defendant's competitors. At least I must assume that such is the fact in the absence of anything in the pleadings to contradict it. And while it is true that the holding of the *Sinclair* case and the *Pick* case has been severely restricted (*International Business Mach. Corp., v. United States*, 1936, 298 U. S. 131, 135; *Judson L. Thompson Mfg. Co. v. Federal Trade Comm.*, C. C. A. 1, 1945, 150 Fed. 2d 952, 956-7, cert. den. 326 U. S. 776; *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, C. C. A. 6, 1936, 83 Fed. 2d 764, 767, reh. den. 85 Fed. 2d 390), nevertheless I prefer to rest the decision in this case upon the second answer. The intent and object of the Lixator and Saltomat leases were manifestly to exclude defendant's competitors from at least one portion of the business of the 900 lessees. Nor do I think such a decision foreclosed by the *Sinclair* or the *Pick* case. [fol. 109] In the *Sinclair* case the pumps did not appear

---

[4] "Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade'. It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain."

to be patented. Here the machines are patented. Presumably, therefore, the identical machines cannot be procured elsewhere. Secondly, in the *Sinclair* case, the pumps were the vendee's means of resale. There was, therefore, an inducement to obtain additional equipment to satisfy customers' demand for other gasoline. Here the product is unknown to the consumer and the inducement is, therefore, lacking. Third, although unstated in the *Sinclair* case, it is nevertheless obvious that to allow a gasoline dealer to serve the public, through a Sinclair pump, gasoline other than Sinclair's would amount to cooperation in a fraud. No such ingredient is present in the instant case. *Signode Steel Strapping Co. v. Federal Trade Comm.*, C. C. A. 4, 1942, 132 Fed. 2d 48, 53.

In the *Pick* case an automobile manufacturer required a dealer by contract to agree not to sell or use in repair of automobiles made by that manufacturer, used parts or parts not manufactured or authorized by the manufacturer. The manufacturer gave to the purchasers of these cars, that is, to the ultimate consumers, a warranty against defect in material and workmanship for a specified period. The replacements were operating parts of a complex mechanism, the origin of which is inevitably attributed to the manufacturer and the failure of which is inevitably placed at his door, with resulting impairment of good will and damage to the reputation of his product. *Oxford Varnish Corp. v.* [fol. 110] *Ault & Wiborg Corp.*, supra at 767 (83 Fed. 2d).

In the instant case the public is totally unaware of either the use of salt in the product or of the source of any salt and the means by which it was acquired. The preservation of the good will of the purchasing public is not at all involved.

Moreover, an analysis of the prices reflected in the 50 Lixator agreements which have been submitted, shows a nominal annual rental of $1 in 13 instances, and no rental other than "good and valuable consideration" in 3 instances. In all Saltomat leases there is provision that, after the lapse of five years, rental shall be at the nominal amount of $1. The same is true in all Lixator leases, with the exception of six instances. In these cases, therefore, the only valuable consideration which the lessor obtained is the lessee's promise to buy unpatented salt from the lessor. In other words, the patent is being used solely to restrain competition.

It appears, therefore, that a violation of Sec. 1 of the Sherman Act and of Sec. 3 of the Clayton Act has been made out.

International Business Machines Corp. v. United States, supra, at p. 140;
Radio Corporation of America v. Lord, C. C. A. 3, 1928, 28 Fed. 2d 257, 260 cert. den. 278 U. S. 648;
Oxford Varnish Corp. v. Ault & Wiborg Corp., supra;
Signode Steel Strapping Co. v. Federal Trade Comm., supra.

[fol. 111] There remains for consideration only the affirmative defense, unsupported by affidavit submitted in opposition to the motion. Therein the defendant alleges that by leasing the machines, instead of selling them, defendant was able to require the machines to be kept in good repair, thereby insuring to the lessee a satisfactory operation of the machine and protecting the good will of the defendant with its customers and the trade. The protection of good will of the lessor is insufficient as a defense where the substantial benefit of the tying clause to the lessor is in the elimination of competition and where it does not appear that the protection of good will cannot be achieved by methods that do not tend to monopoly and are not otherwise unlawful.

International Business Machines Corp. v. U. S., supra at p. 138.

Defendant further alleges in its affirmative defense that in entering into the lease it had no intention to create a monopoly or to restrain trade, but only to secure for itself the opportunity to meet competitive prices. Manifestly, defendant's subjective state of mind cannot affect the determination of the present motion.

The answer further alleges that defendant has in many instances sold the Lixators outright where a customer has objected to leasing the machine, and that defendant has [fol. 112] never refused to install a machine because the customer objected to sign one of the standard forms. In a suit to enjoin the use of a lease which is violative of the Clayton Act, it is no defense that an alternative form of

lease claimed to be unobjectionable was offered to the lessee.

United Shoe Machinery Corp., v. U. S., 1922, 258 U. S. 451, 464, reh. den. 259 U. S. 575.

Defendant's allegation, unsupported by affidavit, that in many instances lessees purchased salt and salt tablets from sources other than defendant, and that in such instances the defendant has made no effort to enforce the covenants of the lease, is no defense in an action of this character. The power to do so is ever present.

United Shoe Machinery Corp v. U. S., supra, at p. 458.

Finally, it is alleged by defendant that to insure the satisfactory operation of the machine, and for the protection of its good will, it is necessary to use salt and salt tablets of a specified grade and content which defendant's product alone is sure to offer. This defense is likewise insufficient even if the allegation were true, which is doubtful.

International Business Machines Corp. v. U. S., supra, at p. 138;

Judson L. Thomson Mfg. Co. v. Federal Trade Commission, supra, at p. 957.

[fols. 113-114] The motion for summary judgment is granted.

Defendant calls attention to the nature of the relief demanded by plaintiff in its prayer for judgment and argues that in any event plaintiff is not entitled to all of the relief it seeks. No decision is now made with respect to it. Further hearing will be had concerning the terms of the decree to be entered herein.

Dated, New York, N. Y., November 20, 1946.

Simon H. Rifkind, U. S. D. J.

[fols. 115-116] [File endorsement omitted.]

[fol. 117] Copy

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

Civil No. 32-310

UNITED STATES OF AMERICA, Plaintiff,

v.

INTERNATIONAL SALT COMPANY, INCORPORATED, et al.

JUDGMENT—Filed December 27, 1946

This cause having come on for a hearing before the Court upon a motion by the plaintiff for a summary judgment against defendant International Salt Company, Incorporated, counsel for the parties having been heard and the Court having determined, upon consideration of the pleadings and admissions on file, that there is no genuine issue between the parties as to any material fact, and the Court having filed its opinion herein on the 20th day of November, 1946, granting the motion for summary judgment.

It is hereby ordered, adjudged, and decreed:

I

The Court has jurisdiction of the subject matter hereof and of the parties hereto.

II

The defendant International Salt Company, Incorporated (referred to hereafter as International Salt) has entered into contracts in restraint of, and has used patents and patent rights owned or controlled by defendant International Salt disclosing an invention used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them, to restrain interstate trade and commerce in rock salt and salt tablets (referred [fol. 118] to hereinafter as "salt") in violation of section 1 of the Act of Congress aproved July 2, 1890, as amended, commonly known as the Sherman Act, 15 U. S. C. Sec. 1;

and section 3 of the Act of Congress of October 15, 1914, as amended, commonly known as the Clayton Act, 15 U. S. C. Sec. 14.

III

All the provisions of the lease agreements for the lease of machines referred to as the Lixator and the Saltomat which contain any condition, agreement, or understanding that the lessee shall not use or deal in salt of a competitor or competitors of defendant International Salt are hereby adjudged unlawful and declared illegal and void.

IV

The defendant International Salt, its directors, officers, agents, employees, representatives, successors, subsidiaries, assignees of the rights of the defendant corporation under any lease of any machine referred to in subparagraph (b) hereof, and any person acting or claiming to act for or on behalf of defendant are hereby perpetually enjoined:

(a) From enforcing or attempting to enforce any provision of the agreements adjudged unlawful in paragraph III hereof, and from doing any further acts thereunder.

(b) From entering into any contract, agreement or lease for machines referred to as the Lixator or Saltomat or any machine performing the same or similar functions for use or resale within the United States, or any place under the jurisdiction of the United States, or from fixing a price, rent, or fee charged therefor, or discount from or rebate on such price, rent or fee, upon the condition, agreement, or understanding, directly or indirectly, that the lessee, [fol. 119] purchaser, or user thereof shall not purchase, use or deal in salt of a competitor or competitors of defendant International Salt.

(c) From engaging in or participating in contracts, agreements, or understandings having the purpose or effect of continuing, reviving, or renewing any agreement, condition or understanding adjudged to be unlawful by this judgment.

(d) From removing said machines from the premises of any lessee, purchaser or user thereof because such lessee, purchaser or user purchases, uses or deals in salt manu-

factured or sold by any person, firm or corporation other than defendant International Salt.

(e) From using patents or patent rights owned or controlled by the defendant embodying inventions used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them to control, restrict or limit in any way the purchase of salt from any person, firm or corporation other than defendant International Salt.

(f) From instituting or threatening to institute any action, suit or proceeding for infringement or to collect charges, damages, compensation or royalties alleged to have occurred, or accrued, prior to the date of the entry of this judgment, under any United States patents owned or controlled by the defendant disclosing an invention used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them.

V

Within sixty days after the date of this judgment defendant International Salt shall mail a copy of this judgment to each person with whom it has a lease agreement relating to a Lixator or Saltomat and shall file with this Court proof of compliance with this paragraph.

[fol. 120] VI

Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

[fol. 121-122] VII

Judgment is entered against the defendant for all costs to be taxed in this proceeding.

VIII

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, for the amendment, modifications or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

Simon H. Rifkind, United States District Judge.

Dated: Dec. 27, 1946.

Judgment Rendered. William V. Connell. Dec. 27, 1946.

[fol. 123] In the District Court of the United States

[Title omitted]

Assignment of Errors—Filed January 24, 1947

Defendant-Appellant, International Salt Company, Incorporated, files the following assignment of errors upon which it will rely on its appeal to the Supreme Court of

the United States from the judgment of this court entered the 27th day of December, 1946.

The Court erred:

1. In granting the plaintiff's motion for summary judgment.

2. In holding that this defendant has entered into contracts in restraint of, and has used patents and patent rights owned or controlled by it, disclosing an invention used or useful in the Lixator or Saltomat machines or any similar machines, to restrain interstate trade and commerce in rock salt and salt tablets in violation of Title 15 U. S. C. section 1 and 15 U. S. C. section 14.

3. In holding that all the provisions of the leases of the Lixator and Saltomat machines containing provisions against the lessees' using or dealing in salt of a competitor or competitors of this defendant are unlawful, illegal and void.

[fol. 124] 4. In perpetually enjoining this defendant from enforcing or attempting to enforce any provision of the agreements adjudged unlawful, or from acting thereunder.

5. In perpetually enjoining this defendant from entering into any contract, agreement or lease for Lixator or Saltomat or similar machines for use or resale within the jurisdiction of the United States, or from fixing a price, rent or fee therefor, or discount from or rebate on such price, rent or fee upon the condition, agreement or understanding, directly or indirectly, that the lessee, purchaser or user thereof shall not purchase, use or deal in salt of a competitor or competitors of this defendant.

6. In perpetually restraining this defendant from engaging in or participating in contracts, agreements or understandings for the purpose or effect of continuing, reviving or renewing any agreement adjudged unlawful by the judgment.

7. In perpetually restraining this defendant from removing the machines from the premises of any lessee, purchaser or user because such lessee, purchaser or user purchases, uses or deals in salt manufactured or sold by anyone other than this defendant.

8. In perpetually enjoining this defendant from using patents or patent rights covering inventions used or useful in the Lixator and Saltomat or similar machines owned or controlled by this defendant to control, restrict or limit in any way the purchase of salt from anyone other than this defendant.

9. In perpetually enjoining this defendant from instituting or threatening to institute any action, suit or proceeding for infringement or to collect charges, damages, compensation or royalties alleged to have occurred or accrued, [fols. 125-126] prior to the date of the entry of the judgment, under any United States patents owned or controlled by the defendant disclosing an invention used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them.

10. In directing this defendant within sixty (60) days after the date of the judgment to mail a copy thereof to each person having a lease agreement covering a Lixator or Saltomat and to file proof of such mailing with this court.

11. In directing this defendant to offer to lease or sell or license the use of the Lixator or Saltomat or similar machine to any applicant on non-discriminatory terms and conditions and subject to the provisions contained in paragraph "VI" of the judgment.

12. In entering judgment against this defendant for all the costs of the action.

Wherefore, this defendant prays that the said judgment be reversed and a judgment entered in favor of this defendant and that this defendant have the costs of this appeal.

Putney, Twombly, Hall & Skidmore, By (S.) Lemuel Skidmore, Attorneys for Defendant-Appellant, International Salt Company, Incorporated.

[fols. 127-128] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed January 24, 1947

The defendant, International Salt Company, Incorporated, feeling itself aggrieved by the final judgment of the court entered herein on the 27th day of December, 1946, for the reasons set forth in its assignment of errors which is filed herein, hereby prays an appeal from such judgment to the Supreme Court of the United States, and further prays that an order be entered fixing the amount of bond and security to be given by the defendant as appellant and conditioned as the law directs and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Defendant further prays that enforcement of such final judgment be stayed pending the said appeal and for that purpose prays the court to enter an order fixing the amount of bond and security to be given by the defendant as appellant conditioned that appellant shall prosecute its appeal to effect and answer all damages and costs if it fails to make its appeal good.

Dated January 22, 1947.

Putney, Twombly, Hall & Skidmore, By (S.) Lemuel Skidmore, Attorneys for Defendant-Appellant, International Salt Company, Incorporated.

[fols. 129-130] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 24, 1947

It appearing to the Court that the defendant, International Salt Company, Incorporated, has filed its petition for appeal to the Supreme Court of the United States and has filed therewith its assignment of errors and also its statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Rules of the Supreme Court, duly disclosing that the Supreme Court of

the United States has jurisdiction upon appeal to review the final judgment in question, it is

Ordered that the appeal prayed for be and the same hereby is allowed and granted to the Supreme Court of the United States from the final judgment rendered in this case on the 27th day of December, 1946, and it is further

Ordered that enforcement of such final judgment be stayed pending the disposition of said appeal, such stay to be effective upon the filing by appellant and approval by this Court of a bond in the sum of Two hundred fifty Dollars ($250) with sufficient sureties, conditioned that it as appellant will prosecute its appeal to effect, and answer all damages by reason of delay and costs if it fails to make its appeal good.

Dated, January 23rd, 1947.

Hulbert, U. S. D. J.

[fols. 131-132] Citation in usual form showing service on J. C. Wilson, filed Jan. 29, 1947, omitted in printing.

[fols. 133-134] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 135] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 4, 1947

To the Clerk of the United States District Court:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal herein and include in said transcript in the order given below the following papers:

1. The summons, dated July 26, 1945.
2. The bill of complaint and exhibits attached thereto.
3. Defendant's answer.
4. Plaintiff's request for admissions under Rule 36, dated May 21, 1946, together with exhibits attached thereto.
5. Defendant's notice of admissions pursuant to Rule 36.
6. Notice of motion and motion for summary judgment, dated July 2, 1946.

7. Opinion.
8. Final judgment proposed by plaintiff.
9. Final judgment, entered December 27, 1946.
10. Stipulation dismissing complaint as to defendants Edward L. Fuller and Hervey J. Osborn, dated January 17, 1947.
11. Plaintiff's petition for appeal herein.
12. Plaintiff's assignment of errors.
13. Plaintiff's statement as to jurisdiction.
14. Order allowing appeal dated February 25th 1947.
15. Citation.
16. Statement directing attention to rule 12(3) of the Rules of the Supreme Court.
[fol. 136-140] 17. Notice of serving appeal papers.
18. This praecipe.

Wendell Berge, Assistant Attorney General, Robert C. Barnard, Special Assistant to the Attorney General.

This 4th day of March, 1947.

Service acknowledged and copy received this 4th day of March, 1947.

Putney, Twombly, Hall & Skidmore, Attorneys for International Salt Company, Inc.

[fol. 141] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 25, 1947

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment of this Court entered on the twenty-seventh day of December, 1946, does hereby pray an appeal from said final judgment to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court, to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Wendell Berge, Assistant Attorney General; Robert C. Barnard, Special Assistant to the Attorney General.

Dated this 25th day of February, 1947.

[fol. 142] IN UNITED STATES DISTRICT COURT
[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 25, 1947

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final decree in the district court on December 27, 1946, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in failing to grant the plaintiff relief adequate to dissipate the effects of the violations of law which it found.

2. The court erred in failing to enjoin defendant from enforcing the patents, disclosing an invention used or useful in defendant's Lixator and Saltomat machines, improperly used by defendant in violation of the law.

3. The court erred in failing to provide in the judgment entered that the Attorney General or his authorized representatives might, for the purpose of assuring compliance with the court's judgment and subject to appropriate safeguards, inspect records and interview employees of the defendant.

4. The court erred in failing to hold that improper use of patents to control competition in unpatented products through leases containing tying clauses was unlawful *per se*.

5. The court erred in failing to grant the plaintiff the [fol. 143] relief to which it is entitled.

Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

Wendell Berge, Assistant Attorney General. Robert C. Barnard, Special Assistant to the Attorney General.

Dated this 25 day of February, 1947.

[fol. 144] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on the twenty-seventh day of December, 1946, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for.

Simon H. Rifkind, United States District Judge.

Dated this 25th day of February, 1947.

[fols. 145-146] Citation, in usual form, showing service on Counsel for defendants, filed Feb. 26, 1947, omitted in printing.

[fol. 147] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 148] SUPREME COURT OF THE UNITED STATES

INTERNATIONAL SALT COMPANY, INCORPORATED, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Plaintiff-Appellee

STATEMENT OF POINTS ON WHICH DEFENDANT-APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF RECORD—Filed March 5, 1947

Pursuant to Rule 13, Paragraph 9, of the Revised Rules of this Court, defendant-appellant states that it intends to rely upon all the points in its Assignment of Errors.

Defendant-Appellant deems the entire record as filed in the above entitled cause necessary for consideration of the points relied upon, except the fifty (50) photostatic copies of leases annexed to the plaintiff-appellee's Request for Admissions under Rule 36 of the Rules of Civil Procedure, dated May 21, 1946.

Dated: March 4, 1947.

Henry B. Twombly, Counsel for Defendant-Appellant.

The undersigned hereby admits service of a copy of the foregoing statement of points to be relied on and parts of the record to be printed, this 4th day of March, 1947.

Wendell Berge —, Atty. for Plaintiff-Appellee.

[fol. 149] [File endorsement omitted.]

[fols. 150-151] IN THE SUPREME COURT OF THE UNITED STATES

INTERNATIONAL SALT COMPANY, INCORPORATED, et al., Appellant,

v.

UNITED STATES OF AMERICA

STIPULATION AS TO PRINTING OF RECORD—Filed March 13, 1947

It is hereby stipulated by and between counsel for the respective parties in the above-entitled cause that the fifty photostatic copies of leases annexed to plaintiff-appellee's

request for admissions under Rule 36 of the Rules of Civil Procedure, dated May 21, 1946, introduced in the course of the proceedings before the District Court and which have been filed in this Court as part of the record in the above-entitled cause, be not printed but that any party be permitted to refer to, quote from, or reproduce any of said exhibits in whole or in part in its briefs or oral argument before this Court, as fully as though they were included in the printed record in this Court.

George T. Washington, Acting Solicitor General.

Dated: March 6, 1947.

Henry B. Twombley, Counsel for International Salt Company, Incorporated.

Date: March 7, 1947.

[fol. 152] [File endorsement omitted.]

[fol. 153] IN THE SUPREME COURT OF THE UNITED STATES

THE UNITED STATES OF AMERICA, Appellant,

v.

INTERNATIONAL SALT COMPANY, INCORPORATED, et al.

On Appeal from the United States District Court for the Southern District of New York

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed April 15, 1947

1. Now comes the Appellant in the above cause and for its statement of points upon which it intends to rely in its appeal in this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. Appelee herein as Appellant in No. 1076, this Term, International Salt Company v. United States of America, has heretofore designated for printing by the Clerk of this Court the entire record, as filed pursuant to its praecipe to the Clerk of the United States District Court for the

Southern District of New York, except the fifty photostatic copies of leases annexed to the Request for Admissions made by the appellant herein under Rule 36 of the Rules of Civil Procedure, dated May 21, 1946. This appeal may be heard on the record so designated, plus the following which is hereby designated for printing by the Clerk of this Court:

1. Final judgment proposed by appellant (Item 8 of its praecipe to the Clerk of the United States District Court).

[fol. 154] 2. Appellant's petition for appeal herein.

3. Appellant's assignment of errors.

4. Order allowing appeal dated February 25, 1947.

5. Citation.

6. Statement directing attention to Rule 12(3) of the Rules of the Supreme Court.

7. Notice of serving appeal papers.

8. Praecipe.

9. This designation.

George T. Washington, Acting Solicitor General.

Dated April 14, 1947.

[fol. 155] [File endorsement omitted.]

[fol. 156] SUPREME COURT OF THE UNITED STATES

INTERNATIONAL SALT COMPANY, INCORPORTATED, Appellant,

vs.

THE UNITED STATES OF AMERICA; and

THE UNITED STATES OF AMERICA, Appellant,

vs.

INTERNATIONAL SALT COMPANY, INCORPORATED

ORDER NOTING PROBABLE JURISDICTION—April 28, 1947

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 51,940, 52,072. Southern New York, D. C. U. S. Term No. 1076. International Salt Company, Incorporated, Appellant, vs. The United States of America. Term No. 1208. The United States of America, Appellant, vs. International Salt Company, Incorporated. Filed February 28, 1947, April 4, 1947. Term Nos. 1076 O. T. 1946, 1208 O. T. 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 28 1947.
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1076 46

INTERNATIONAL SALT COMPANY, INCORPORATED,

Appellant,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

HENRY B. TWOMBLY,
LEMUEL SKIDMORE,
Counsel for Appellant.

PUTNEY, TWOMBLY, HALL & SKIDMORE,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain the jurisdiction	1
Date of judgment sought to be reviewed and date upon which application for appeal was presented	4
Statement showing that the nature of the case and of the decisions of the Court are such as to bring the case within the jurisdictional provisions relied upon	4
Cases believed to sustain the jurisdiction	4
Statement of the grounds upon which it is contended that the questions involved are substantial	5
The record before the Court	6
Argument	8
Statement respecting opinion	11
Appendix "A"—Opinion of the District Court	12

Table of Cases Cited

Ethyl Gasoline Corp. v. *U. S.*, 309 U. S. 436	5
Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 463	10
G. S. Suppiger v. *Morton Salt Co.*, 117 F. (2d) 968	10
Hartford-Empire Co. et al. v. *U. S.*, 323 U. S. 386	5
International Business Machine Corp. v. *U. S.*, 298 U. S. 131	5
Mercoid Corp. v. *Mid-Continent Investment Co.*, 320 U. S. 661	10
Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U. S. 488	9
Pick Mfg. Co. v. *General Motors Corporation*, 299 U. S. 3, 80 F. (2d) 641	10
Standard Oil Co. v. *U. S.*, 283 U. S. 163	10

Page

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 5

United States v. *Crescent Amusement Co.*, 323 U. S. 173 5

United States v. *Univis Lens Co., Inc.*, 316 U. S. 241 5

STATUTES CITED

Act of Congress of July 2, 1890, Sections 1 and 4 (15 U. S. C. 1, 4) 4, 5

Act of Congress of October 15, 1914, Sections 3 and 15 2

Judicial Code, Section 238 (28 U. S. C. 345) 2

United States Code, Title 15:

Sections 1-7 2

Section 29 2

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

Civil No. 32-310

UNITED STATES OF AMERICA

Plaintiff,

vs.

INTERNATIONAL SALT COMPANY,
INCORPORATED, ET AL.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

Filed January 24, 1947

The defendant-appellant, having this day presented its brief for appeal, now files this statement of the basis upon which it contends that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

A. The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from the final judgment or decree which has determined that defendant, International Salt Company, Incorporated, has entered into contracts and has used certain patents and patent rights owned or con-

trolled by it in restraint of interstate trade and commerce, in violation of Section 1 of the Act of Congress approved July 2, 1890, commonly known as the Sherman Act, 15 U. S. C. 1, and Section 3 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act, 15 U. S. C. 14. The said final judgment further determined certain provisions of the agreements above mentioned to be unlawful, illegal and void and restrained this defendant from enforcing such provisions of such agreements, entering into any new contracts of similar effect, using its patent rights in certain respects and suing for infringement or the collection of royalties which may have occurred or accrued prior to the entry of the judgment from which this appeal was taken, and it further directed International Salt Company, Incorporated, to offer to lease, sell or license the use of the machines covered by the aforesaid patents to any applicant on non-discriminatory terms. The final judgment was rendered by the District Court upon a motion by plaintiff for summary judgment and without a trial, upon said court's determination that there were no issues of fact to be tried.

Section 238 of the United States Judicial Code, 28 U. S. C. 345, provides, in part, as follows:

> "#345, (Judicial Code, section 238). Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> "(1) Section 29 of Title 15, * * *"

Title 15 U. S. C., section 29, provides, as follows:

> "#29. Appeals to Supreme Court.
>
> "In every suit in equity brought in any district court of the United States under sections 1-7 of this title, wherein the United States is complainant, an appeal

from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however, That* if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise.

If, by reason of disqualification, death or otherwise, any of said three circuit judges shall be unable to participate in the decision of said case any such vacancy or vacancies shall be filled by the senior circuit judge by designating one or more other circuit judges of the said circuit next in order of seniority and, if there be none such available, he shall fill any such vacancy or vacancies by designating one or more circuit judges from another circuit or circuits, designating, in each case, the oldest available circuit judge, in order of seniority, in the circuit from which he is selected, such designation to be only with the consent of the senior circuit judge of any such other circuit. As amended June 9, 1944, c. 239, 58 Stat. 272."

B. Date of Judgment Sought to Be Reviewed and Date upon Which Application for Appeal Is Presented

The final judgment herein sought to be reviewed was entered on December 27, 1946.

The petition for appeal herein is dated simultaneously herewith and is presented and to be filed simultaneously herewith, on the 22nd day of January, 1947.

C. Statement Showing That the Nature of the Case and of the Decision of the Court Are Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

The action is a civil action and the plaintiff herein is the United States of America. Paragraph "I." of the complaint herein, entitled "Jurisdiction and Venue", alleges that the complaint is filed and the proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890 (Sherman Act), as well as under Section 15 of the Act of Congress of October 15, 1914 (Clayton Act), to prevent and restrain continuing violations of Section 1 of the Sherman Act (15 U. S. C. 1), and of Section 3 of the Clayton Act (15 U. S. C. 14). Title 15 U. S. C. 29 provides for a direct appeal to the Supreme Court of the United States in any action in equity under Sections 1-7 of Title 15 wherein the United States is complainant.

The judgment appealed from by its specific terms, determines that the defendant has violated Section 1 of the Sherman Act (15 U. S. C. 1), as well as Section 3 of the Clayton Act.

D. Cases Believed to Sustain the Jurisdiction

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction of the

Supreme Court on direct appeal to review the final judgment in question:

Hartford-Empire Company, et al., v. *United States*, 323 U. S. 386 (1945);
International Business Machine Corp. v. *United States*, 298 U. S. 131;
United States v. *Crescent Amusement Co., et al.*, 323 U. S. 173 (1944);
United States v. *Bausch & Lomb Optical Co., et al.*, 321 U. S. 707 (1944);
United States v. *Univis Lens Co., Inc., et al.*, 316 U. S. 241 (1942);
Ethyl Gasoline Corporation v. *United States*, 309 U. S. 436 (1940).

E. Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Three questions are involved on this appeal:

(1) Whether the provisions in the defendant's Lixator and Saltomat leases whereby the lessee agreed to use only rock salt or salt tablets manufactured and sold by the lessor, International Salt Company, Incorporated, with a clause giving the lessee the benefit of any decline in the price of either of such articles, constituted as a matter of law an unreasonable restraint of trade in violation of Section 1 of the Sherman Anti-Trust Act (15 U. S. C. 1).

(2) Whether the effect of the Lixator and Saltomat leases above described was, as a matter of law, to lessen competition substantially in the sale of rock salt and salt tablets in violation of Section 3 of the Clayton Act (15 U. S. C. 14).

(3) Did the fact, admitted by the defendant International Salt Company, Incorporated, in its answer that in 1944 de-

fendant sold approximately 119,000 tons of salt having an approximate value of $500,000, for use in said Lixator and Saltomat machines, establish in and of itself an undue and unreasonable restraint of trade on the part of defendant International Salt Company, Incorporated, in violation of Section 1 of the Sherman Act, or a lessening of competition effected by the Lixator and Saltomat leases which was on its face substantial, and in violation of Section 3 of the Clayton Act.

It is contended that these are all new questions, which have not yet been passed upon by the U. S. Supreme Court, are substantial, and of public interest as a novel interpretation of the anti-trust laws.

The Record Before the Court

The complaint in this action in substance alleges that defendant International Salt Company, Incorporated (hereinafter referred to as International Salt), violated Section 1 of the Sherman Act, and Section 3 of the Clayton Act by its entering into certain agreements concerning two patented machines known as the Lixator and the Saltomat, the patents on which are owned or controlled by International Salt. The agreements complained of consist of leases of such machines to various users of rock salt and salt tablets, which leases contain clauses by which the lessee agreed to use in said leased machines only rock salt or salt tablets purchased from the lessor, International Salt, with a further provision, however, in the case of the Lixator leases giving the lessee the benefit of any general reduction in the price of rock salt suitable for use in the Lixator, and in the case of the Saltomat giving the lessee the benefit of any general reduction in lessor's price of salt tablets suitable for use in the Saltomat machines.

The complaint further alleges that there were at present outstanding more than 750 Lixator leases and approximately 100 Saltomat leases, that defendant International Salt refused to grant licenses or rights or to sell or lease such machines free of the aforesaid restrictions, that defendant thereby intended to and did lessen competition in the sale of rock salt and salt tablets for use in such machines, and intended to and did prevent other salt manufacturers from selling their products to users of such machines, and that the effect of such leases has been substantially to lessen competition in the sale of salt, rock salt; and salt tablets to the lessees of Lixators and Saltomats.

Defendant's answer admitted the making of the leases, but denied the allegations regarding its intent to lessen competition, and the allegation that such leases had the effect of substantially lessening competition. It admitted that there were more than 750 Lixator leases outstanding and approximately 100 Saltomat leases, and further admitted that in 1944 defendant International Salt sold approximately 119,000 tons of salt having an approximate value of $500,000 for use in said Lixator and Saltomat machines. As an affirmative defense, the answer alleged that defendant International Salt in entering into such Lixator and Saltomat leases had no purpose or intent to create a monopoly in the sale of rock salt or salt tablets, or to restrain trade or commerce in such articles, but only to secure for itself the opportunity to meet competitive prices in such articles, and that the making of such leases did not in fact result in creating any monopoly or restraining trade or commerce in such products.

It further alleged that in fact many of defendant's lessees had been granted leases without the restrictive clause, that in many instances defendant sold Lixators outright and without restrictions, and that in no case had defendant refused to install a Lixator or Saltomat because the customer

objected to signing a lease containing the restrictive clause complained of; that in many instances lessees of the Lixators and Saltomats had purchased rock salt and salt tablets for use in such machines from sources other than defendant International Salt to the knowledge of said defendant, and in no instance had the defendant removed or attempted to remove or threatened to remove the machine from the possession of such lessee. It further alleged facts establishing that the Lixator and Saltomat machines would operate in a more satisfactory manner with the defendant's rock salt and salt tablets, because of the high Sodium Chloride of the defendant's rock salt and its lack of impurities, and because the defendant's salt tablets were manufactured from high purity evaporated salt made especially to meet the requirements of the canning industry and containing a minimum of the chemical impurities ordinarily found in such salt tablets, also that the containers for the defendant's salt tablets were made with a glazed interior surface which prevented the salt tablets from sticking to the side of the container and acquiring impurities and foreign matter from that source to be later introduced into the canned vegetables; and that the requirement limiting the lessee to the use of the defendant's rock salt and salt tablets was necessary to the satisfactory operation of the machine and the protection of the defendant's good-will.

The sole facts on which the Court relied in granting the motion for summary judgment are contained in the complaint and answer plus the copies of Lixator leases submitted by defendant at plaintiff's request, and forming a part of the record before the Court.

Argument

We have been able to find no decision where a lease of a patented machine has been held to violate the Sherman or Clayton Act because of so-called "tie-in" clauses where the

lease gives to the lessee the benefit of any decrease in the price of the material required to be used with the machine. This question, which is squarely involved on this appeal, is one of first impression.

The decision of the District Court in the case at bar, moreover, was based to a large extent on the decision in *Morton Salt Co.* v. *G. S. Suppiger Co.* (1942), 314 U. S. 488, in which the Supreme Court allowed a summary judgment dismissing a suit for patent infringement where it appeared that the patent owner had annexed to the patent license an obligation on the part of the licensee to buy from the patent owner unpatented salt tablets for use with the dispensing machine. The Supreme Court in that case, however, expressly refused to decide the question whether the lessor had violated the Clayton Act, that being one of the grounds urged on the appeal. Moreover, the Circuit Court of Appeals for the 7th Circuit, which did consider in the *Morton Salt Co.* case the question whether a violation of the Sherman Act or of the Clayton Act was established that would support the granting of a motion for summary judgment, held that there were factual questions to be determined before a showing of a violation of the Sherman Act or Clayton Act could be made out, and it reversed the judgment of the District Court which granted summary judgment on the ground of a violation of the anti-trust laws and denied the motion for summary judgment. The *Morton Salt Co.* case, therefore, in so far as the question of violation of the anti-trust laws was considered in that case, is an authority for a reversal of the judgment in the case at bar.

The District Court in the case at bar recognized the fact that the U. S. Supreme Court had not decided in the *Morton Salt Co.* case the question involved on this appeal. It rested its decision rather on an alleged extension of the doctrine of the *Morton Salt Co.* case based on certain language em-

ployed by the Supreme Court in its opinion in a later case, *Mercoid Corp.* v. *Mid-Continent Investment Co.* (1944) 320 U. S. 661. This language quoted on page 8 of the District Court's opinion is pure dictum, and if the point of law decided in the case at bar is to become established law it should be only by a considered decision of the U. S. Supreme Court in a case in which the question is squarely raised.

This is especially true where the decision of the District Court in the case at bar that plaintiff is entitled to summary judgment is in conflict with the decision of the 7th Circuit Court of Appeals in the *Morton Salt Co.* case.

The decision of the District Court, moreover, is in our opinion in conflict with the decisions of the U. S. Supreme Court in *Federal Trade Commission* v. *Sinclair Refining Co.* (1923) 261 U. S. 463, and in *Pick Mfg. Co.* v. *General Motors Corporation* (1936) 299 U. S. 3 affirming 80 Fed. (2d) 641. These two cases were considered by the District Court Judge (see opinion page 9) and because of them he refused to rest his decision on the ground that the conduct of the defendant International Salt was unlawful *per se*. He based his decision on the ground that "a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial."

This finding of the District Court is, we submit, in conflict with the decision of the U. S. Supreme Court in *Standard Oil Co.* v. *United States*, 283 U. S. 163, and with the decision of the 7th Circuit Court of Appeals in *G. S. Suppiger* v. *Morton Salt Co.* 117 Fed. (2d) 968 (cited supra) which at p. 972 of its opinion said:

> "• • • The volume of all the salt business is large. The amount used in the canning field is so small that its complete control would not result in a monopoly of the salt industry. It is not the salt tablet as such but the salt which goes into the salt tablet which must de-

termine the monopolistic tendency of plaintiff's lease contracts. For comparison see the amount of cracked gas to all gasoline used in the Standard Oil case, with the percentage of salt used in canning to all salt used for all purposes.' ' '"

"' ' ' Due to the District Court's entry of its decree in a summary proceeding, we are not able to determine the monopolistic extent of plaintiff's contract. The court was clearly in error in granting this summary judgment without an inquiry into the facts. Unless the defendant can make 'a definite factual showing of illegality' arising from plaintiff's agreement with its licensee, it is not entitled to judgment of dismissal. The presence of such a factual issue, ordinarily, is a bar to the granting of a summary judgment."

F. Statement Respecting Opinions

The District Court delivered a written opinion on granting the plaintiff's motion for summary judgment, but made no other finds of fact or conclusions of law in connection with the entry of the final judgment in question. A copy of the District Court's opinion is reproduced as appendix A, and attached to this jurisdictional statement.

By written consent of the parties dated January 17, 1947, the complaint was dismissed without prejudice as to the individual defendants Edward L. Fuller and Hervey J. Osborn.

Respectfully submitted,

LEMUEL SKIDMORE,
HENRY B. TWOMBLY,
Attorneys for International Salt Company, Incorporated, Appellant.

PUTNEY, TWOMBLY, HALL & SKIDMORE,
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 32-310

UNITED STATES OF AMERICA, *Plaintiff*,

against

INTERNATIONAL SALT COMPANY INCORPORATED, et al., *Defendants*

APPEARANCES:

Robert C. Barnard, Esq. Spec. Asst. to Atty. Gen. Atty. for United States
Wendell Berge, Asst. Atty. Gen.
Jas. C. Wilson, Spec. Asst. to Atty. Gen.
Butney, Twombly, Hall & Skidmore, Esqs. Attorneys for Defts.
Lemuel Skidmore, Esq.
Howard F. Ordman, Esq.
Of counsel

RIFKIND, *J.*

Plaintiff has moved for summary judgment (F. R. C. P., Rule 56; *United States v. Associated Press,* S.D. N.Y., 1943, 52 Fed. Supp. 362, aff. 326 U.S. 1) against the corporate defendant only, on the ground that the pleadings and admissions of the defendant show absence of any genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law. No affidavits have been submitted by either party.

This is a civil action brought pursuant to Sec. 4 of the Sherman Act, 15 U.S.C.A. 4, and Sec. 15 of the Clayton Act, 15 U.S.C.A. 25, to enjoin defendant from carrying out agreements in alleged violation of Sec. 1 of the Sherman Act, 15 U.S.C.A. 1[1] and Sec. 3 of the Clayton Act, 15 U.S.C.A. 14.[2]

---

[1] The relevant portion of § 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in re-

Defendant International Salt Company, Inc. (hereinafter referred to as defendant) is the largest producer of salt for industrial uses in the United States. It is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes. It is also engaged in the manufacture and distribution of a machine known as the "Lixator", which is manufactured by the defendant under patents owned by it. Defendant is also engaged in the distribution of a machine known as the "Saltomat", which defendant causes to be manufactured under a patent owned by it.

The Lixator dissolves rock salt, a raw material sold by defendant and other companies, into a salt brine solution. This brine is an essential part of the manufacturing processes of many industries, such as meat packing, refrigeration, laundering. The Saltomat is a machine used to inject a salt tablet of uniform quantity into canned products during the process of canning.

Defendant's business is interstate. In 1944, defendant sold approximately 119,000 tons of salt, having a value of approximately $500,000 for use with one or the other of the machines mentioned. Salt in many respects similar to that made and sold by the defendant is and has been sold by other companies in competition with the salt and salt tablets distributed by the defendant.

---

straint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *".

[3] Section 3 of the Clayton Act provides, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

During the past three years, defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Lixator. There are in effect 840 lease agreements, each lease covering one Lixator machine. Of these 840 leases, 790 were made on the defendant's standard form of agreement. The remaining 50 vary in one or more respects.

The form contract for the Lixator contains a clause which reads as follows:

> "It is further mutually agreed that the said LIXATE Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said LIXATE Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:
>
> "If at any time during the term of this lease a general reduction in price of grade of salt suitable for use in the said LIXATE Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payments of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price".

It further provides as follows:

> "Should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirement of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shal have the right, upon 30 days' written notice of intention to do so, to remove the said LIXATE Process Dissolver from the possession of said Lessee".

Concerning the 50 Lixator agreements which differ from the printed form, the variations are set forth in the margin.[3]

During the past two years defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Saltomat. There are in effect 73 lease agreements covering 96 Saltomat machines. Each lease was entered into on defendant's printed form, which likewise contains a clause requiring the lessee to purchase defendant's salt tablets for use in the machine. The text of that clause is as follows:

> "It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided: If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price".

The lease further provides:

> "• • • should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of

[3] All but 4 leases contain tying clauses, requiring the purchase of some or all of the rock salt from the lessor. Three leases permit the lessee to buy 50% of its salt requirements from defendant's competitors. Five leases with Armour & Co. provide that Armour & Co. may use salt produced by itself. In most instances the modifications are of little or no importance, for example, variances relating to additional facilities furnished by the lessor, and minor variations in rental terms or cancellation terms.

this lease, said Lessor shall have the right, upon 10 days' written notice of intention to do so, to remove the said salt Tablet Depositor(s) from the premises and/or possession of said Lessee".

The rock salt and salt tablets sold by defendant are unpatented articles.

Defendant denies, and for the purposes of this motion for summary judgment I must accept its denial as fact, that it has refused to grant licenses or other rights to other persons free of the aforesaid restrictions. It admits that it has in some instances refused to sell the machine outright. Defendant, however, asserts in its affirmative defense that it has in some instances sold Lixators outright to customers who objected to leasing the machine, and that in such cases it imposed no restrictions concerning the source from which the rock salt for use in the machine was to be purchased. The answer also asserts that in no case has defendant at any time refused to install either a Lixator or a Saltomat machine on the ground that the customer objected to the defendant's restrictions concerning the purchase of salt from the defendant.

This case presents for decision the precise question which the Supreme Court found it unnecessary to decide in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 1942, 314 U. S. 488, reh. den. 315 U. S. 826. In that case the court allowed a summary judgment dismissing a suit for patent infringement where it appeared that the patent owner had annexed to the patent license an obligation on the part of the licensee to buy from the patent owner unpatented salt tablets for use with the patented dispensing machine. The court said (at page 494):

> "It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity".

Interstitially we find in that opinion the cells from which the decision of the instant case could grow. The court spoke of "making use of [plaintiff's] patent monopoly to restrain competition in the marketing of unpatented articles, salt tablets * * * and * * * aiding in the creation of a limited monopoly in the tablets not within that granted by the patent" (p. 491), and also said that "courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest" (p. 492). I am unable to bring to mind any public interest which the court could have had in contemplation other than the public interest in the maintenance of a system of free competition. The misconduct which disqualified the plaintiff in the *Morton* case from enforcing his patent right was interference with the system of free competition. True enough the disposition made by the court of the case rendered it unnecessary for it to consider whether the restraint upon trade was undue or unreasonable or whether the lessening of competition was substantial. But clearly a petty or merely nominal offense against the public interest would hardly justify the court in withholding its aid to the holder of the patent. This reasoning is not dispositive, it nevertheless points a direction. In that direction the court has moved. In *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 1944, 320 U. S. 661, the court not only extended the doctrine of the *Morton* case to a contributory infringer, but also used language much more explicitly expressive of its intention to go forward in the direction but faintly suggested by the *Morton* case. It said:

> "It is the public interest which is dominant in the patent system. (p. 665) * * * The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. (p. 666) * * * The patent is employed to protect the market for a device on which no patent has been granted. But for the patent such restraint on trade would *plainly run afoul of the anti-trust laws.* If the restraint is lawful because of the patent, the patent will

> have been expanded by contract. * * * Such a vast power 'to multiply monopolies' at the will of the patentee * * * would carve out exceptions to the anti-trust laws which Congress has not sanctioned. (p. 667) * * * Should such a decree [an injunction against infringement] be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and *a violation of the anti-trust laws.* (p. 670)". [Italics supplied.]

True, the *Mercoid* decision was not reached upon a motion for summary judgment, but the facts of record in that case show nothing more than is here admitted on motion.

In the light of these general principles the problem presented by the instant case must be decided. The defendant here urges the impropriety of summary judgment because of the presence of two triable issues, namely, (1) whether the Lixâtor and Saltomat leases do in fact substantially lessen competition, or tend to create a monopoly in salt, and, (2) whether the restraint of trade affected by these leases, if any, is an unreasonable restraint.

This contention is confronted by two possible answers. The first is that the conduct complained of is unlawful *per se.*

> *Fashion Originators Guild of America* v. *Federal Trade Commission,* C. C. A. 2, 1940, 114 Fed. 2d 80, 85 (footnote [4]), affd. 1941, 312 U. S. 457.

The other is that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial.

Were it not for *Federal Trade Commission v. Sinclair Refining Co.,* 1923, 261 U.S. 463 and *Pick Mfg. Co. v. General*

---

[4] "Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade'. It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain."

Motors Corp., 1936, 299 U.S. 3, aff'g. 80 Fed. 2d 641, I should rest this case on the first answer. In this case, like in the cited cases, the lessees were apparently free to obtain competitive machines and equipment to handle the salt and salt tablets, and thereby be in a position to purchase salt from the defendant's competitors. At least I must assume that such is the fact in the absence of anything in the pleadings to contradict it. And while it is true that the holding of the *Sinclair* case and the *Pick* case has been severely restricted (*International Business Mach. Corp., v. United States*, 1936, 298 U.S. 131, 135; *Judson L. Thompson Mfg. Co. v. Federal Trade Comm.*, C.C.A. 1, 1945, 150 Fed. 2d 952, 956-7, cert. den. 326 U.S. 776; *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, C.C.A. 6, 1936, 83 Fed. 2d 764, 767, reh. den. 85 Fed. 2d 390), nevertheless I prefer to rest the decision in this case upon the second answer. The intent and object of the Lixator and Saltomat leases were manifestly to exclude defendant's competitors from at least one portion of the business of the 900 lessees. Nor do I think such a decision foreclosed by the *Sinclair* or the *Pick* case.

In the *Sinclair* case the pumps did not appear to be patented. Here the machines are patented. Presumably, therefore, the identical machines cannot be procured elsewhere. Secondly, in the *Sinclair* case, the pumps were the vendee's means of resale. There was, therefore, an inducement to obtain additional equipment to satisfy customers' demand for other gasoline. Here the product is unknown to the consumer and the inducement is, therefore, lacking. Third, although unstated in the *Sinclair* case, it is nevertheless obvious that to allow a gasoline dealer to serve the public, through a Sinclair pump, gasoline other than Sinclair's would amount to cooperation in a fraud. No such ingredient is present in the instant case. *Signode Steel Strapping Co. v. Federal Trade Comm.*, C.C.A. 4, 1942, 132 Fed. 2d 48, 53.

In the *Pick* case an automobile manufacturer required a dealer by contract to agree not to sell or use in repair of automobiles made by that manufacturer, used parts or parts not manufactured or authorized by the manufacturer. The manufacturer gave to the purchasers of these cars, that is, to the ultimate consumers, a warranty against defect in

material and workmanship for a specified period. The replacements were operating parts of a complex mechanism, the origin of which is inevitably attributed to the manufacturer and the failure of which is inevitably placed at his door, with resulting impairment of good will and damage to the reputation of his product. *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, supra, at 767 (83 Fed. 2d).

In the instant case the public is totally unaware of either the use of salt in the product or of the source of any salt and the means by which it was acquired. The preservation of the good will of the purchasing public is not at all involved.

Moreover, an analysis of the prices reflected in the 50 Lixator agreements which have been submitted, shows a nominal annual rental of $1 in 13 instances, and no rental other than "good and valuable consideration" in 3 instances. In all Saltomat leases there is provision that, after the lapse of five years, rental shall be at the nominal amount of $1. The same is true in all Lixator leases, with the exception of six instances. In these cases, therefore, the only valuable consideration which the lessor obtained is the lessee's promise to buy unpatented salt from the lessor. In other words, the patent is being used solely to restrain competition.

It appears, therefore, that a violation of Sec. 1 of the Sherman Act and of Sec. 3 of the Clayton Act has been made out.

International Business Machines Corp. v. United States, supra, at p. 140;
Radio Corporation of America v. Lord, C.C.A. 3, 1928, 28 Fed. 2d 257, 260, cert. den. 278 U.S. 648;
Oxford Varnish Corp. v. Ault & Wiborg Corp., supra;
Signode Steel Strapping Co. v. Federal Trade Comm., supra.

There remains for consideration only the affirmative defense, unsupported by affidavit submitted in opposition to the motion. Therein the defendant alleges that by leasing the machines, instead of selling them, defendant was able to require the machines to be kept in good repair, thereby insuring to the lessee a satisfactory operation of

the machine and protecting the good will of the defendant with its customers and the trade. The protection of good will of the lessor is insufficient as a defense where the substantial benefit of the tying clause to the lessor is in the elimination of competition and where it does not appear that the protection of good will cannot be achieved by methods that do not tend to monopoly and are not otherwise unlawful.

International Business Machines Corp. v. *U. S.*, supra, at p. 138.

Defendant further alleges in its affirmative defense that in entering into the lease it had no intention to create a monopoly or to restrain trade, but only to secure for itself the opportunity to meet competitive prices. Manifestly, defendant's subjective state of mind cannot affect the determination of the present motion.

The answer further alleges that defendant has in many instances sold the Lixators outright where a customer has objected to leasing the machine, and that defendant has never refused to install a machine because the customer objected to sign one of the standard forms. In a suit to enjoin the use of a lease which is violative of the Clayton Act, it is no defense that an alternative form of lease claimed to be unobjectionable was offered to the lessee.

United Shoe Machinery Corp. v. *U. S.*, 1922, 258 U. S. 451, 464, reh. den. 259 U. S. 575.

Defendant's allegation, unsupported by affidavit, that in many instances lessees purchased salt and salt tablets from sources other than defendant, and that in such instances the defendant has made no effort to enforce the covenants of the lease, is no defense in an action of this character. The power to do so is ever present.

United Shoe Machinery Corp. v. *U. S.*, supra, at p. 458.

Finally, it is alleged by defendant that to insure the satisfactory operation of the machine, and for the protection of its good will, it is necessary to use salt and salt tablets of a specified grade and content which defendant's product

alone is sure to offer. This defense is likewise insufficient even if the allegation were true, which is doubtful.[5]

International Business Machines Corp. v. *U. S.*, supra, at p. 138;

Judson L. Thomson Mfg. Co. v. *Federal Trade Commission*, supra, at p. 957.

The motion for summary judgment is granted.

Defendant calls attention to the nature of the relief demanded by plaintiff in its prayer for judgment and argues that in any event plaintiff is not entitled to all of the relief it seeks. No decision is now made with respect to it. Further hearing will be had concerning the terms of the decree to be entered herein.

Dated, New York, N. Y., November 20, 1946.

SIMON H. RIFKIND,
U. S. D. J.

[5] Out of the 50 submitted Lixator agreements, in five instances the lessee was permitted to use its own salt. In two instances the lessee was required to buy from the lessor only 50% of the salt used. In four instances there was no tying clause.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 4 1947
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 62

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

INTERNATIONAL SALT COMPANY, INCORPORATED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

CIVIL ACTION NO. 32–310

UNITED STATES OF AMERICA, PLAINTIFF

v.

INTERNATIONAL SALT COMPANY, INCORPORATED, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this case on December 27, 1946. A petition for appeal is presented to the District Court herewith, to-wit, on February 25, 1947.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36

Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208; *International Business Machines Corp.* v. *United States*, 298 U. S. 131.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890 (26 Stat. 209, as amended, 15 U. S. C. Secs. 1 and 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-

> General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 3 of the Act of October 15, 1914 (38 Stat. 731, 15 U. S. C. Sec. 14), commonly known as the Clayton Act, is as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

THE ISSUES AND THE RULING

This is an equity suit brought by the United States in the Federal District Court for the

Southern District of New York against International Salt Company, Inc., and two of its principal officers (as to both of whom the complaint was subsequently dismissed) charging them with violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act. After defendants' answer and following certain admissions of the defendant Salt Company as requested by the Government, the Government moved for summary judgment against it on the ground that the pleadings and admissions disclosed that there was no genuine issue of fact and that none of the defenses set forth was sufficient in law. The district court granted the Government's motion in a written opinion, and a final judgment granting certain equitable relief was entered on December 27, 1946.

The facts, as disclosed by the pleadings and admissions and as set forth in the district court's opinion, may be summarized as follow:

The defendant Salt Company, the largest producer of salt for industrial purposes in the United States, is engaged in the business of distributing two patented machines for dispensing salt products which it leases to users upon restrictive provisions obligating the lessees to use the Salt Company's salt products in the machines. The machines are manufactured by or for the account of defendant under patents owned by it. These machines are: (1) the "Lixator" which dissolves rock salt into a brine solution essential

in the manufacturing processes of such industries as meat packing, tanning, steel, dyeing, refrigeration, and other industries; and (2) the "Saltomat" which is used to inject a salt tablet of uniform condition into canned products during the process of canning. In 1944, the Company sold about 119,000 tons of salt products of a value of approximately $500,000 for use in such machines. The salt products made by the Company for use in its machines are unpatented and similar products are made by competitors.

At the time of the decision below, the Salt Company had outstanding 840 leases covering the use of its Lixator machine, of which 790 were made on its standard form. The standard leases are for an indefinite term, and provide for payment of a varying rental sum, payable in equal annual installments for the first five years, and thereafter for a rental of $1.00 per year. The lessee is obligated to use in the machine salt purchased from the Salt Company at prices and upon terms and conditions to be agreed upon. A proviso clause stipulates that in the event of a general reduction in the price of salt, the lessee shall give the Salt Company an opportunity to meet the competitive price of salt quoted. If the Salt Company fails to meet the lowered price, and until such time as it does so, the lessee may buy its requirements for use in the machine on the open market. The lessor may retake possession

of the machine upon thirty days' notice for any breach of agreement on a part of the lessee, including discontinuing to purchase its salt requirements from the lessor.

The fifty leases not executed in defendant's standard form usually vary but slightly in terms, and almost all require the lessee to purchase some or all of its salt requirements from the lessor.

During the two years prior to institution of this action, the Salt Company executed 73 lease agreements covering the use of its Saltomat, all of which are on a standard form. The leases are indefinite in duration, and provide for annual rental fees. The lessee is obligated to use in conjunction with the machine only salt tablets purchased from the lessor at prices and upon terms and conditions to be agreed upon. In the event, the lessor reduces the price of its salt product, it is obligated to give the lessee the benefit of the reduced price. The lessor is permitted to retake possession of the machine upon ten days' notice for any breach of agreement on the part of the lessee, including failure to purchase its salt requirements for the machine from the lessor.

On these facts the district court determined that the defendant had violated both Section 1 of the Sherman Act and Section 3 of the Clayton Act. It refused to hold that the defendant's conduct was unlawful *per se* under the Sherman Act but it reached the conclusion that there was in

fact an unreasonable restraint of trade violative of that Act in that the tying clauses were operative upon some 900 business units obligating them to purchase products of a value of $500,000 per annum. It further determined that these same facts warranted the conclusion that the tying clauses resulted in a substantial lessening of competition and therefore violated Section 3 of the Clayton Act.

In its decree the court adjudged the tying clauses illegal and enjoined the Salt Company from their enforcement and from entering into any such arrangements in the future. The Salt Company was obligated, under terms and conditions specified in the court's judgment, to offer to sell or lease its machines to existing lessees and to prospective customers upon reasonable and nondiscriminatory terms.

The Court refused to grant, and the Government assigned as error its refusal to grant, an injunction preventing defendant from instituting any actions for infringement or otherwise based upon the patents it had abused covering the manufacture of its two machines. Instead, the court granted an injunction preventing institution of such actions only in respect of acts occurring prior to the entry of its decree. The court also refused to insert in its decree a provision authorizing the Attorney General or his authorized representatives, subject to suitable safeguards, to ex-

amine records and interview officials and employees of defendant to assure compliance with the decree.

THE QUESTIONS ARE SUBSTANTIAL

The basic question presented on this appeal is whether the decree which has been entered grants relief adequate under the circumstance to protect the public interest. The district court concluded that the Salt Company had improperly used its patents to restrain trade in violation of the antitrust laws. The provisions of the decree, however, are designed almost exclusively to prevent a recurrence of the defendant's past unlawful conduct and no adequate relief has been given to dissipate the effects of that conduct. The sole provision of the decree which has any potential to dissipate past effects of the illegality is the injunction against the maintenance of infringement suits based upon the abused patents. But, since this injunction is limited to preventing the maintenance of suits in respect of alleged infringing acts *occurring prior to the date of the court's decree,* there is nothing to indicate that it will ever have any practical effect.

The advantages which have accrued to the defendants through its violations of law may be substantial. Through its unlawful tying clauses it has been able to enter into business relationships with some 900 purchasers of salt products and the

mere creation of these exclusive relationships may redound to its advantage. The opportunity to sell salt products to some 900 businesses is now for the first time available to its competitors, but defendant commences the competitive race with a headstart brought about by its unlawful conduct.

The decree fails to take account of the decisions of this Court in *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 486, and *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495. The *Morton Salt* case presented an identical pattern of abuse of patents. In that case, although the Court held that it was not necessary to determine whether there were any violations of the antitrust laws, the Court refused to enforce the abused patents so long as the consequences of the patentee's conduct continued. Other types of patent abuse have resulted in a similar refusal by the Supreme Court to enforce the abused patents. *Mercoid Corp.* v. *Honeywell Co.*, 320 U. S. 680; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661. See also *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, No. 208 this term, decided February 3, 1947.

The court's decision also appears to be in conflict with the decision in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386. While it is true that the Court there, divided as to this point, refused to order royalty-free licensing of abused patents, it did require compulsory licensing at a

reasonable royalty to make or use the device disclosed by the abused patents (p. 413).[1] Affirmative relief in the form of compulsory licensing to manufacture was designed to dissipate the effects of the patent owners' unlawful conduct. The court's judgment in the instant case, therefore, falls far short of *Hartford-Empire*.

We submit that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

United States District Court, Southern District of New York

Civ. 32–310

UNITED STATES OF AMERICA, PLAINTIFF

v.

INTERNATIONAL SALT COMPANY INCORPORATED ET AL., DEFENDANTS

Appearances: Robert C. Barnard, Esq., Spec. Asst. to Atty. Gen., Atty. for United States; Wen-

[1] The Supreme Court has been asked by the Government to reconsider and overrule the *Hartford-Empire* case in so far as it may be considered to hold that a decree prohibiting the enforcement of abused patents is under no circumstances appropriate relief for violations of law arising from the abuse of the patents. *United States* v. *National Lead*, No. 89, October term 1946, argued February 3–5.

dell Berge, Asst. Atty. Gen.; Jas. C. Wilson, Spec. Asst. to Atty. Gen. Butney, Twombly, Hall & Skidmore, Esqs., Attorneys for Defts.; Lemuel Skidmore, Esq.; Howard F. Ordman, Esq.; Of counsel.

RIFKIND, *J.*

Plaintiff has moved for summary judgment (F. R. C. P., Rule 56; *United States* v. *Associated Press.* S. D. N. Y., 1943, 52 Fed. Supp. 362, aff. 326 U. S. 1) against the corporate defendant only, on the ground that the pleadings and admissions of the defendant show absence of any genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law. No affidavits have been submitted by either party.

This is a civil action brought pursuant to Sec. 4 of the Sherman Act, 15 U. S. C. A. 4, and Sec. 15 of the Clayton Act, 15 U. S. C. A. 25, to enjoin defendant from carrying out agreements in alleged violation of Sec. 1 of the Sherman Act, 15 U. S. C. A. 1 ([1]) and Sec. 3 of the Clayton Act, 15 U. S. C. A. 14 ([2]).

[1] The relevant portion of § 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *."

[2] Section 3 of the Clayton Act provides, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, con-

Defendant International Salt Company, Inc. (hereinafter referred to as defendant) is the largest producer of salt for industrial uses in the United States. It is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes. It is also engaged in the manufacture and distribution of a machine known as the "Lixator," which is manufactured by the defendant under patents owned by it. Defendant is also engaged in the distribution of a machine known as the "Saltomat," which defendant causes to be manufactured under a patent owned by it.

The Lixator dissolves rock salt, a raw material sold by defendant and other companies, into a salt brine solution. This brine is an essential part of the manufacturing processes of many industries, such as meat packing, refrigeration, laundering. The Saltomat is a machine used to inject a salt tablet of uniform quantity into canned products during the process of canning.

---

sumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Defendant's business is interstate. In 1944, defendant sold approximately 119,000 tons of salt, having a value of approximately $500,000 for use with one or the other of the machines mentioned. Salt in many respects similar to that made and sold by the defendant is and has been sold by other companies in competition with the salt and salt tablets distributed by the defendant.

During the past three years, defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Lixator. There are in effect 840 lease agreements, each lease covering one Lixator machine. Of these 840 leases, 790 were made on the defendant's standard form of agreement. The remaining 50 vary in one or more respects.

The form contract for the Lixator contains a clause which reads as follows:

> It is further mutually agreed that the said LIXATE Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said LIXATE Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, *Provided:*
>
> If at any time during the term of this lease a general reduction in price of grade

> of salt suitable for use in the said LIXATE Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payments of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the same competitive price.

It further provides as follows:

> Should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirement of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 30 days written notice of intention to do so, to remove the said LIXATE Process Dissolver from the possession of said Lessee.

Concerning the 50 Lixator agreements which differ from the Printed form, the variations are set forth in the margin.[8]

[8] All but 4 leases contain tying clauses, requiring the purchase of some or all of the rock salt from the lessor. Three leases permit the lessee to buy 50% of its salt requirements from defendant's competitors. Five leases with Armour & Co. provided that Armour & Co. may use salt produced by itself. In most instances the modifications are of little or no importance, for example, variances relating to additional facilities furnished by the lessor, and minor variations in rental terms or cancellation terms.

During the past two years defendant has, and still is, engaged in entering into lease agreements with various persons for the use of the Saltomat. There are in effect 73 lease agreements covering 96 Saltomat machines. Each lease was entered into on defendant's printed form, which likewise contains a clause requiring the lessee to purchase defendant's salt tablets for use in the machine. The text of that clause is as follows:

> It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease; and that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, *Provided:* If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price".

The lease further provides:

> * * * should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its

> agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 10 days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee.

The rock salt and salt tablets sold by defendant are unpatented articles.

Defendant denies, and for the purposes of this motion for summary judgment I must accept its denial as fact, that it has refused to grant licenses or other rights to other persons free of the aforesaid restrictions. It admits that it has in some instances refused to sell the machine outright. Defendant, however, asserts in its affirmative defense that it has in some instances sold Lixators outright to customers who objected to leasing the machine, and that in such cases it imposed no restrictions concerning the source from which the rock salt for use in the machine was to be purchased. The answer also asserts that in no case has defendant at any time refused to install either a Lixator or a Saltomat machine on the ground that the customer objected to accept the defendant's restrictions concerning the purchase of salt from the defendant.

This case presents for decision the precise question which the Supreme Court found it unnecessary to decide in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 1942, 314 U. S. 488, reh. den. 325 U. S. 826. In that case the court allowed a summary

judgment dismissing a suit for patent infringement where it appeared that the patent owner had annexed to the patent license an obligation on the part of the licensee to buy from the patent owner unpatented salt tablets for use with the patented dispensing machine. The court said (at page 494):

> It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity.

Interstitially we find in that opinion the cells from which the decision of the instant case could grow. The court spoke of "making use of (plaintiff's) patent monopoly to restrain competition in the marketing of unpatented articles, salt tablets * * * and * * * aiding in the creation of a limited monopoly in the tablets not within that granted by the patent" (p. 491), and also said that "courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest" (p. 492). I am unable to bring to mind any public interest which the court could have had in contemplation other than the public interest in the maintenance of a system of free competition. The misconduct which dis-

qualified the plaintiff in the *Morton* case from enforcing his patent right was interference with the system of free competition. True enough the disposition made by the court of the case rendered it unnecessary for it to consider whether the restraint upon trade was undue or unreasonable or whether the lessening of competition was substantial. But clearly a petty or merely nominal offense against the public interest would hardly justify the court in withholding its aid to the holder of the patent. This reasoning is not dispositive, it nevertheless points a direction. In that direction the court has moved. In *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 1944, 320 U. S. 661, the court not only extended the doctrine of the *Morton* case to a contributory infringer, but also used language much more explicitly expressive of its intention to go forward in the direction but faintly suggested by the *Morton* case. It said:

> It is the public interest which is dominant in the patent system (p. 665). * * * The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use (p. 666). * * * The patent is employed to protect the market for a device on which no patent has been granted. But for the patent such restraint on trade would *plainly run afoul of the anti-trust*

> *laws.* If the restrain is lawful because of the patent, the patent will have been expanded by contract. * * * Such a vast power "to multiply monopolies" at the will of the patentee * * * would carve out exceptions to the anti-trust laws which Congress has not sanctioned (p. 667). * * * Should such a decree (an injunction against infringement) be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and *a violation of the anti-trust laws* (p. 670). [Italics supplied.]

True, the *Mercoid* decision was not reached upon a motion for summary judgment, but the facts of record in that case show nothing more than is here admitted on motion.

In the light of these general principles the problem presented by the instant case must be decided. The defendant here urges the impropriety of summary judgment because of the presence of two triable issues, namely, (1) whether the Lixator and Saltomat leases do in fact substantially lessen competition or tend to create a monopoly in salt, and, (2) whether the restraint of trade affected by these leases, if any, is an unreasonable restraint.

This contention is confronted by two possible answers. The first is that the conduct complained of is unlawful *per se.*

> *Fashion Originators Guild of America* v. *Federal Trade Commission,* C. C. A. 2,

1940, 114 Fed. 2d 80, 85,* affd. 1941, 312 U. S. 457.

The other is that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial.

Were it not for *Federal Trade Commission* v. *Sinclair Refining Co.*, 1923, 261 U. S. 463 and *Pick Mfg. Co.* v. *General Motors Corp.*, 1936, 299 U. S. 3, aff'g. 80 Fed. 2d 641, I should rest this case on the first answer. In this case, like in the cited cases, the lessees were apparently free to obtain competitive machines and equipment to handle the salt and salt tablets, and thereby be in a position to purchase salt from the defendant's competitors. At least I must assume that such is the fact in the absence of anything in the pleadings to contradict it. And while it is true that the holding of the *Sinclair* case and the *Pick* case has been severely restricted (*International Business Mach. Corp.*, v. *United States*, 1936, 298 U. S. 131, 135; *Judson L. Thompson Mfg. Co.* v. *Federal Trade Comm.*, C. C. A. 1, 1945, 150 Fed. 2d 952, 956–7, cert. den., 326 U. S. 776; *Oxford Var-*

* "Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade.' It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain."

nish Corp. v. *Ault & Wiborg Corp.*, C. C. A. 6, 1936, 83 Fed. 2d 764, reh. den. 85 Fed. 2d 390), nevertheless I prefer to rest the decision in this case upon the second answer. The intent and object of the Lixator and Saltomat leases were manifestly to exclude defendant's competitors from at least one portion of the business of the 900 lessees. Nor do I think such a decision foreclosed by the *Sinclair* or the *Pick* case.

In the *Sinclair* case the pumps did not appear to be patented. Here the machines are patented. Presumably, therefore, the identical machines cannot be procured elsewhere. Secondly, in the *Sinclair* case, the pumps were the vendee's means of resale. There was, therefore, an inducement to obtain additional equipment to satisfy customers' demand for other gasoline. Here the product is unknown to the consumer and the inducement is, therefore, lacking. Third, although unstated in the *Sinclair* case, it is nevertheless obvious that to allow a gasoline dealer to serve the public, through a Sinclair pump, gasoline other than Sinclair's would amount to cooperation in a fraud. No such ingredient is present in the instant case. *Signode Steel Strapping Co.* v. *Federal Trade Comm.*, C. C. A. 4, 1942, 132 Fed. 2d 48, 53.

In the *Pick* case an automobile manufacturer required a dealer by contract to agree not to sell or use in repair of automobiles made by that manufacturer, used parts or parts not manufactured

or authorized by the manufacturer. The manufacturer gave to the purchasers of these cars, that is, to the ultimate consumers, a warranty against defect in material and workmanship for a specified period. The replacements were operating parts of a complex mechanism, the origin of which is inevitably attributed to the manufacturer and the failure of which is inevitably placed at his door, with resulting impairment of good will and damage to the reputation of his product. *Oxford Varnish Corp.* v. *Ault & Wiborg Corp., supra* at 767 (83 Fed. 2d).

In the instant case the public is totally unaware of either the use of salt in the product or of the source of any salt and the means by which it was acquired. The preservation of the good will of the purchasing public is not at all involved.

Moreover, an analysis of the prices reflected in the 50 Lixator agreements which have been submitted, shows a nominal annual rental of $1 in 13 instances, and no rental other than "good and valuable consideration" in 3 instances. In all Saltomat leases there is provision that, after the lapse of five years, rental shall be at the nominal amount of $1. The same is true in all Lixator leases, with the exception of six instances. In these cases, therefore, the only valuable consideration which the lessor obtained is the lessee's promise to buy unpatented salt from the lessor. In other words, the patent is being used solely to restrain competition.

It appears, therefore, that a violation of Sec. 1 of the Sherman Act and of Sec. 3 of the Clayton Act has been made out.

International Business Machines Corp. v. *United States, supra,* at p. 140.

Radio Corporation of America v. *Lord,* C. C. A. 3, 1928, 28 Fed. 2d 257, 260 cert. den. 278 U. S. 648.

Oxford Varnish Corp. v. *Ault & Wiborg Corp., supra;*

Signode Steel Strapping Co. v. *Federal Trade Comm., supra.*

There remains for consideration only the affirmative defense, unsupported by affidavit submitted in opposition to the motion. Therein the defendant alleges that by leasing the machines, instead of selling them, defendant was able to require the machines to be kept in good repair, thereby insuring to the lessee a satisfactory operation of the machine and protecting the good will of the defendant with its customers and the trade. The protection of good will of the lessor is insufficient as a defense where the substantial benefit of the tying clause to the lessor is in the elimination of competition and where it does not appear that the protection of good will cannot be achieved by methods that do not tend to monopoly and are not otherwise unlawful.

International Business Machines Corp. v. *U. S., supra,* at p. 138.

Defendant further alleges in its affirmative defense that in entering into the lease it had no intention to create a monopoly or to restrain trade, but only to secure for itself the opportunity to meet competitive prices. Manifestly, defendant's subjective state of mind cannot affect the determination of the present motion.

The answer further alleges that defendant has in many instances sold the Lixators outright where a customer has objected to leasing the machine, and that defendant has never refused to install a machine because the customer objected to sign one of the standard forms. In a suit to enjoin the use of a lease which is violative of the Clayton Act, it is no defense that an alternative form of lease claimed to be unobjectionable was offered to the lessee.

> *United Shoe Machinery Corp.* v. *U. S.*, 1922, 258 U. S. 451, 464, reh. den. 259 U. S. 575.

Defendant's allegation, unsupported by affidavit, that in many instances lessees purchased salt and salt tablets from sources other than defendant, and that in such instances the defendant has made no effort to enforce the covenants of the lease, is no defense in an action of this character. The power to do so is ever present.

> *United Shoe Machinery Corp.* v. *U. S.*, supra, at p. 458.

Finally, it is alleged by defendant that to insure the satisfactory operation of the machine, and for the protection of its good will, it is necessary to use salt and salt tablets of a specified grade and content which defendant's products alone is sure to offer. This defense is likewise insufficient even if the allegation were true, which is doubtful.*

International Business Machines Corp. v. *U. S.*, supra, at p. 138;
Judson L. Thomson Mfg. Co. v. *Federal Trade Commission*, supra, at p. 957.

The motion for summary judgment is granted.

Defendant calls attention to the nature of the relief demanded by plaintiff in its prayer for judgment and argues that in any event plaintiff is not entitled to all of the relief it seeks. No decision is now made with respect to it. Further hearing will be had concerning the terms of the decree to be entered herein.

Dated, New York, N. Y., November 20, 1946.

(S.) SIMON H. RIFKIND,
U. S. D. J.

* Out of the 50 submitted Lixator agreements, in five instances the lessee was permitted to use its own salt. In two instances the lessee was required to buy from the lessor only 50% of the salt used. In four instances there was no tying clause.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 24 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

INTERNATIONAL SALT COMPANY, INCORPORATED,
Appellant,
against
UNITED STATES OF AMERICA.

No. [redacted] 46

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

LEMUEL SKIDMORE,
Counsel for
INTERNATIONAL SALT COMPANY, INCORPORATED.

LOUIS H. HALL,
HOWARD F. ORDMAN,
Of Counsel.

[illegible] PRINTED ON THE [illegible] PRESS [illegible]

INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Statement of the case	2
A. The Pleadings	2
B. The Judgment	4
C. Statement of facts	7
(a) The Lixator Leases	8
(b) The Saltomat Lease	13
Specification of errors, statement of issues, and summary of argument	17
The Statutes	18
Argument	19
I. The Lixator and Saltomat leases do not per se violate the provisions of Section 1 of the Sherman Anti-Trust Act or of Section 3 of the Clayton Act	19
II. The record in this case did not justify the granting of summary judgment	30
III. The provisions of Paragraph VI of the judgment should, in any event, be modified	36
Conclusion	41

Cases Cited

American Optical Co. *v.* New Jersey Optical Co., 58 Fed. (Sup.) 601	36
Appalachian Coals, Inc. *v.* United States, 288 U. S. 344	20
B. S. Pearsall Butter Co. *v.* Federal Trade Commission (C.C.A. 7th Circ.), 292 Fed. 720	31

PAGE

Chicago Board of Trade *v.* United States, 246 U. S. 231 21
DeBeers Consolidated Mines Ltd. *v.* United States, 325 U. S. 212 38
Federal Trade Commission *v.* Sinclair Refining Co., 261 U. S. 463 ..... 23, 25, 30
Hartford-Empire Co. *v.* United States, 323 U. S. 386 38
International Business Machines Corp. *v.* United States, 298 U. S. 131 ..... 25, 35
Mercoid Corp. *v.* Mid-Continent Investment Co., 320 U. S. 661 ..... 26, 29
Morton Salt Company *v.* G. S. Suppiger Co., 314 U. S. 488 ..... 26, 27, 28
Pick Mfg. Co. *v.* General Motors Corp., 299 U. S. 3 ..... 24, 30, 36
Standard Fashion Company *v.* Magrane-Houston Company, 258 U. S. 346 21
Standard Oil Co. *v.* Federal Trade Commission (C.C.A. 3rd Cir.), 282 Fed. 81 ..... 22, 26
Standard Oil Co. *v.* United States, 283 U. S. 163 ..... 27, 28
Transwrap Corp. *v.* Stokes Co. (1947), 329 U. S. 637 29
United Shoe Machinery Co. *v.* United States, 258 U. S. 451 ..... 23, 26
United States *v.* American Can Co., 234 Fed. 1019 38
United States *v.* Bausch & Lomb Co., 321 U. S. 707 38

Statutes

15 U. S. C. 29, 32 Stat. 823, 36 Stat. 1167 2
28 U. S. C. 345, 36 Stat. 1157, 38 Stat. 804 2
15 U. S. C. 1, 26 Stat. 209 ..... 17, 18, 20
15 U. S. C. 13(b), 38 Stat. 730, 49 Stat. 1526 40
15 U. S. C. 14, 38 Stat. 730 ..... 17, 19, 21
Rule 56, Federal Rules of Civil Procedure 19, 20

Texts

Moore's Federal Practice, Vol. 3, §56.01, p. 3175 35

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

INTERNATIONAL SALT COMPANY, INCORPORATED,
Appellant,

against

UNITED STATES OF AMERICA.

No. 1076

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

This is an appeal by defendant, International Salt Company, Incorporated, (hereinafter referred to as "International Salt") from a judgment of the United States District Court for the Southern District of New York granting a motion for summary judgment made by plaintiff below. The action was originally brought against two individual defendants, in addition to the defendant-appellant, but was dismissed as against the individual defendants by consent (R. 25).

An appeal was also taken from the judgment of the District Court by the plaintiff below, United States of America, based on certain assignments of error filed by plaintiff (R. 44, 45). Said appeal by plaintiff below has been dismissed by consent since the filing of the transcript of record.

Opinion Below

The opinion of the District Court is reported in 6 F.R.D. 302 (1946), and is printed at R. 26.

Jurisdiction

The judgment of the District Court was entered and filed on December 27, 1946 (R. 36). An order of the District Court allowing this appeal was entered January 23, 1947 (R. 42), and this Court noted probable jurisdiction on April 28, 1947 (R. 50). This Court has jurisdiction by virtue of Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345).

Statement of the Case

A. The Pleadings

The complaint alleges that defendant International Salt manufactures and distributes a patented machine known as the Lixate Process Dissolver (hereinafter referred to as the "Lixator"), which dissolves rock salt, a raw material sold by defendant, International Salt, and other companies, into a salt brine solution, and also manufactures and distributes a patented machine known as the Saltomat Automatic Salt Dissolver (hereinafter referred to as the Saltomat), which is used as a dispenser of salt tablets (R. 4); that said machines and rock salt and salt tablets for use in said machines are shipped by said defendant in interstate commerce to customers throughout the United States (R. 5), and that the Lixator and

Saltomat machines are leased by defendant under a form of lease agreement applicable to the respective machines. (Exhibit A to complaint, R. 11; Exhibit B to complaint, R. 12). It further alleges that said lease agreements are in violation of Sec. 1 of the Sherman Anti-Trust Act, and Sec. 3 of the Clayton Act by reason of certain terms in said agreements providing that said machines shall be used only in conjunction with the rock salt and salt tablets purchased from the defendant International Salt, and that by bringing about, maintaining and carrying out the aforesaid agreements defendant intended to and did suppress and restrain competition in the sale of rock salt and salt tablets by tying the use of the said unpatented raw materials to the use of the aforesaid patented machines, and has substantially lessened competition in the sale of rock salt and salt tablets to the aforesaid lessees of Lixators and Saltomats (R. 5, 7, 8).

As appears from the complaint and the exhibits attached thereto, the Lixator leases contain a provision that in the event of a general reduction in price of grades of salt suitable for use in the Lixator, the lessee shall give the lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case the lessor shall fail or be unable to do so, the lessee upon continued payment of the rental agreed upon shall have the privilege of continued use of the leased equipment with salt purchased in the open market until such time as the lessor shall furnish a suitable grade of salt at the competitive price (R. 6, 11). The Saltomat lease provides that if at any time during the term of the lease, a general reduction in lessor's price of salt tablets suitable for use in the Saltomat shall be made, the lessor shall provide lessee with salt tablets at a like price (R. 7, 12).

In the prayer for relief (R. 9), the plaintiff asks that the defendant be perpetually enjoined from participating in, maintaining or carrying out the restrictions in said form lease agreements, and for other alleged incidental relief which has been granted, in part, by the Court below.

The answer, in addition to the denials and admissions, pleads an affirmative defense (R. 16) the allegations of which, for the purposes of this appeal, must be deemed admitted, the Court below having granted plaintiff's motion for summary judgment and no affidavits having been submitted by either party. The allegations of this affirmative defense and the defendant's admissions are discussed hereafter under the Statement of Facts.

B. The Judgment

The judgment of the District Court finds that all the provisions of the lease agreements of the Lixator and Saltomat machines which contain any condition, agreement or understanding that the lessee shall not use or deal in salt of a competitor or competitors of defendant, International Salt, are unlawful, and declared illegal and void (R. 36, 37). It perpetually enjoins the defendant International Salt, its directors, officers, agents, employees, representatives, successors, subsidiaries, assignees of the rights of the defendant corporation under any lease of any Lixator or Saltamat machine and any person acting or claiming to act for or on behalf of the defendant (R. 37):

(a) From enforcing or attempting to enforce any provision of the agreements adjudged unlawful, and from doing any further acts thereunder;

(b) From entering into any contract, agreement, or lease for Lixator or Saltomat machines, or any machine performing the same or similar functions, for use or resale within the United States, or any place under the jurisdiction of the United States, or from fixing a price, rental, or fee charged therefor or discount from or rebate on such price, rental or fee, upon the condition, agreement, or understanding, directly or indirectly, that the lessee, purchaser, or user thereof shall not purchase, use, or deal in salt of a competitor or competitors of defendant, International Salt.

(c) From engaging in or participating in contracts, agreements, or understandings, having the purpose or effect of continuing, revising, or renewing any agreement, condition, or understanding adjudged to be unlawful by said judgment.

(d) From removing said machines from the premises of any lessee, purchaser, or user thereof, because such lessee, purchaser, or user purchases, uses or deals in salt manufactured or sold by any person, firm or corporation other than defendant, International Salt.

(e) From using patents or patent rights owned or controlled by the defendant embodying inventions used or useful in the Lixator or Saltomat machines, or any machine performing a function similar to either of them to control, restrict or limit in any way the purchase of salt from any person, firm or corporation other than defendant, International Salt.

(f) From instituting or threatening to institute any action, suit or proceeding for infringement, or to collect charges, damages, compensation or royalties alleged to

have occurred or accrued prior to the date of the entry of said judgment under any U. S. patents owned or controlled by the defendant disclosing an invention used or useful in the Lixator or Saltomat machines or any machine performing a function similar to either of them.

The judgment also directs (Par. VI, R. 38) defendant, International Salt, to offer to lease or sell or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in the judgment, to any applicant on non-discriminatory terms and conditions, providing that a machine or machines is or are available for such purposes; that defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; that such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating; and provided further that the rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. Any person with whom International Salt now has a lease agreement relating to the Lixator or Saltomat may elect to retain his rights under the existing lease or to enter into a new lease or sale or license contract with defendant, International Salt, in accordance with the provisions of said Paragraph VI of the judgment.

The order of the District Court allowing this appeal, filed January 24, 1947, stayed the enforcement of said judgment pending the disposition of the appeal upon the filing by appellant and approval by said court of a bond in the sum of $250 (R. 43), which bond was filed and approved.

C. Statement of Facts

The judgment of the District Court granted a motion by plaintiff for summary judgment which, in effect, was a motion for judgment on the pleadings. No testimony was taken, and no affidavits were submitted by either party. The facts before the District Court consisted of the allegations of the complaint, in so far as they are admitted in defendant's answer, the allegations of the affirmative defense set forth in defendant's answer which, for the purposes of this appeal, must be deemed to be admitted, and the statement of admissions filed by the defendant in response to a Request for Admissions by plaintiff below under Rule 36 of the Rules of Civil Procedure (R. 20, 23). This includes photostatic copies of the 50 Lixator leases made by defendant, International Salt, and in effect at the time of the commencement of the action which vary in terms from the printed form of lease contract. These 50 photostatic copies of leases have been filed in this Court as part of the record on appeal, but have not been printed. The parties have stipulated that either party is permitted to refer to, quote from, or reproduce any of said exhibits in whole or in part in its briefs or oral argument as fully as though they were included in the printed record (R. 48).

The material facts contained in the record are as follows:

Defendant, International Salt, is a New Jersey corporation with offices in New York City, and is engaged in the business of manufacturing and supplying salt for industrial, agricultural and home purposes. It is the largest producer of salt for industrial uses in the United States (R. 14).

International Salt is also engaged in the manufacture and distribution of the Lixator machine referred to in the complaint, which it manufactures under patents owned by it (R. 4). The other machine referred to in the complaint, known as the Saltomat, is manufactured for the defendant under a patent which it owns (R. 23). Both the Lixator and Saltomat machines are leased by International Salt under standard forms of lease, although in the case of the Lixator the leases in some instances vary from the standard form.

In 1944 Defendant, International Salt, sold approximately 119,000 tons of salt, having an approximate value of $500,000 for use in said Lixator and Saltomat machines (R. 16).

(a) *The Lixator Leases*

The Lixator is a machine which dissolves rock salt into a salt brine solution. Defendant, International Salt, manufactures and sells rock salt suitable for use in these machines. Lixators are leased by International Salt, in most instances, under a standard form of lease, a copy of which is annexed to the complaint marked Exhibit A (R. 11). The lease is at a specified annual rental for five years, payable yearly in advance. After the expiration of the five year period, the rental is at the rate of $1 per year. The standard form of Lixator lease contains the following provisions:

"It is further mutually agreed that the said Lixator Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price.

It is further mutually agreed: that the said Lixate Process Dissolver is and shall continue to be the exclusive property of said Lessor and can not be sold, loaned or otherwise transferred to any other person or corporation without the written consent of said Lessor; that should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

At the time this action was commenced, International Salt had outstanding 840 lease contracts each covering one Lixator. 790 of these lease contracts are on the standard form of Lixator lease above referred to, while 50 of them vary in terms from the printed form (R. 20, 23). These 50 leases will be referred to by the numbers given them in Exhibit I annexed to the plaintiff's Request for Admissions (R. 21).

In four of these leases, Nos. 7, 15, 23, and 46, the so-called "tying" clause is omitted entirely. In three leases, Nos. 6, 40 and 41, the agreement is to purchase only 50% of the lessee's requirements, while in one lease, No. 50, the agreement is to purchase the bulk of the salt used from the lessor. In nine leases, Nos. 14, 16, 17, 18, 19, 21, 47, 48 and 49 the clause permitting removal of the Lixator in the event of violation by the lessee of the agreement to use in the Lixator only salt purchased from the lessor is omitted or stricken out. Five leases with Armour & Co. Nos. 12, 24, 25, 26 and 27, provide that the lessee may use salt produced by the Armour properties. In two leases, No. 29 dated January 25, 1937, and No. 44 dated March 23, 1936, the Lixator, after the expiration of the five year period becomes the property of the lessee and the provisions of the lease agreement terminate. In five leases, Nos. 22, 28, 30, 43 and 45, the lessee is given the right of cancellation upon notice to the lessor. In one lease (No. 35) the right of cancellation is given to the lessee, if the salt furnished by the lessor for the Lixator should prove unsatisfactory. Other variations are as to such matters as additional equipment furnished by the lessor and variations in the rental term.

International Salt has in many instances sold the Lixator outright where the customer has objected to leas-

ing the machine, and without any agreement as to the source from which the rock salt for use in such Lixator was to be purchased (R. 16). It has in some instances refused to sell the Lixator machine (R. 16) but it has never refused to install a Lixator because the customer objected to signing a lease on the standard form (R. 17). In many instances, moreover, lessees have purchased rock salt for use in the leased Lixator from sources other than the defendant, International Salt, to the knowledge of said defendant, and in no instance has International Salt removed or attempted to remove or threatened to remove the machine from the possession of the lessee (R. 17).

Defendant in its answer denies all the allegations of the complaint as to illegality of the lease agreements and restraint of trade and commerce (complaint, Par. 10, R. 5; answer, Par. 7, R. 15), and also the allegations that in bringing about, maintaining and carrying out the lease agreements defendant intended to and did lessen competition in the sale of salt and salt tablets, prevent other manufacturers of salt and salt tablets for use in the Lixator or Saltomat from selling their products to users of said machines in competition with defendant International Salt, prevent the users of said Lixators and Saltomats from purchasing salt and salt tablets suitable for use therein from any company except the defendant, International Salt, and on any prices or terms except those fixed by defendant, International Salt, and suppress and restrain competition in the sale of salt and salt tablets by tying the use of said unpatented raw materials to the use of the aforesaid patented machines (complaint, Pars. 17-20, R. 7, 8; answer, Par. 13, R. 16).

The answer further alleges that defendant, International Salt, in entering into agreements for the lease of the

Lixator machine had no purpose or intent to create a monopoly in the sale of rock salt or to restrict trade and commerce in rock salt, but only to secure for defendant, International Salt, the opportunity to meet competitive prices. It further alleges that the making of such leases did not in fact result in creating any monopoly or restraining trade or commerce in such product (R. 16).

By leasing the Lixator machines rather than selling them outright, International Salt is enabled to require the machine to be kept in good order and repair by the lessee and to have the machine inspected from time to time by its qualified engineer to determine its condition and whether it is functioning properly, thereby insuring to the customer a satisfactory operation of the machine, and protecting the good-will of the lessor with said customer and with the trade (R. 17).

The Lixator is used by the lessees for the purpose of making brine from rock salt through a process owned and promoted by International Salt known as the "Lixate Process". In using such process, it is of extreme importance that rock salt be used of a standard and uniform chemical analysis in order to insure a constant and dependable supply of brine of uniform quality and concentration. The rock salt produced at the mines of International Salt is produced after careful investigation of the salt deposit prior to the actual mining so as to guarantee a grade of salt consistently high in Sodium Chloride content, with the result that the rock salt produced from defendant's mines has an average Sodium Chloride content of 98.2% or higher (R. 17).

The rock salt produced by other mining concerns does not run consistent in Sodium Chloride content and, in many instances, runs as low as 95% Sodium Chloride.

Rock salt of a lower Sodium Chloride content contains a greater amount of insoluble impurities which must be disposed of through the sludge-disposal of the Lixator. In distributing its Lixators, International Salt advises its lessees as to certain fixed intervals at which the sludge disposal should be operated, these intervals being based on the chemical content and analysis of the rock salt produced by defendant. If another salt, with a lower Sodium Chloride content and with more impurities is used in such Lixator, it will require an alteration in the control of the sludge disposal if the Lixator is to operate in a satisfactory manner. Moreover, the use of such impure salt will affect adversely the amount of concentrated brine produced by the Lixator. The successful operation of the Lixator, therefore, and of the defendant's Lixate process used in producing a brine from such machine is dependent on the use of rock salt produced by the defendant, International Salt, with its high Sodium Chloride content and fewer impurities (R. 17, 18).

(b) *The Saltomat Leases*

The Saltomat machines are manufactured for the defendant, International Salt, under a patent owned by said defendant (R. 23).

These machines are used to inject salt in specific and uniform quantities into canned products during the process of canning, the salt being put into the Saltomat machine in the form of salt tablets (R. 18).

International Salt leases these machines under a standard form of lease, copy of which is annexed to the complaint marked Exhibit B (R. 12). These leases are for the term of one year, or part thereof, at a specified rental

payable yearly in advance. The lease also contains the following provisions:

"It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, PROVIDED:

If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price.

It is further mutually agreed that Lessor shall be under no liability to anyone for injury resulting from said machine or the use thereof while it is in Lessee's custody or possession, and the Lessee agrees to hold Lessor harmless from any such claim of liability and all expense resulting therefrom or in connection therewith; that the said Salt Tablet Depositor(s) is (are) and shall continue to be the exclusive property of said Lessor and cannot be sold, loaned or otherwise transferred to any person or corporation without the written consent of said Lessor; that should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon ten days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

International Salt, at the time of the commencement of this action had in effect 73 lease contracts covering 96 Saltomats, all on this standard form (R. 20, 23).

Defendant in its answer denies the allegations of the complaint as to the illegality of the Saltomat leases and restraint of trade and commerce (R. 5, 15), and the allegations that the defendant in bringing about, maintaining and carrying out the said leases intended to and did lessen, suppress and restrain competition in the sale of salt tablets (complaint, Pars. 17-20, R. 7, 8; answer, Par. 13, R. 16).

The answer further alleges that in entering into said Saltomat leases, defendant International Salt had no purpose or intent to create a monopoly in the sale of salt tablets or to restrain trade or commerce in such salt tablets, but only to secure for defendant the opportunity to meet competitive prices in salt tablets, and that the making of such leases did not in fact result in creating any monopoly or restricting trade or commerce in such product (R. 16).

In some instances defendant has refused to sell Saltomat machines (R. 16), but in no case has it ever refused to install a Saltomat machine because the customer objected to signing a lease on the standard form (R. 16, 17). Moreover, in many instances, lessees of the Saltomat machine have purchased salt tablets for use in such Saltomat from sources other than the defendant, International Salt, to the knowledge of said defendant, and in no such instance has defendant removed or attempted to remove or threatened to remove the machine from the possession of such lessee (R. 17).

By leasing the Saltomat machines rather than selling them outright, International Salt is able to require the

machine to be kept in good order and repair by the lessee and to have the machine inspected from time to time by its qualified engineer to determine its condition and whether it is functioning properly, thereby insuring to the customer a satisfactory operation of the machine and protecting the good-will of International Salt with said customer and with the trade (R. 17).

Moreover, the salt tablets manufactured by defendant, International Salt, are manufactured from high purity evaporated salt made especially to meet the requirements of the canning industry. They contain a minimum of Calcium Sulphate, an impurity which, when used in the process of canning vegetables such as peas and beans, causes a hardening of the skin of the vegetable which is very objectionable to the consumer. Users of Saltomat machines distributed by defendant, International Salt, have a more successful experience with such machines if they use tablets made by International Salt from salt produced by it which contains a minimum of impurities and is especially designed to meet the specifications of the canning industry (R. 18).

Furthermore, in many instances where a stock of salt tablets is carried over by a customer from one canning season to the next, humidity in the storage warehouse will cause the tablets partially to dissolve or to become moist. Those next to the shipping containers, in that event, will adhere to the side of the container and unless protected by a proper coating will pick up impurities such as small pieces of paper from the container. International Salt has overcome this problem by having the containers for its salt tablets made with a glazed interior surface, so that the tendency of the salt tablets when moist to adhere

to the side of the container has been practically eliminated (R. 18, 19). Where salt tablets not produced by defendant, International Salt, and containing impurities or foreign matter from the sides of the container, are used in a Saltomat, such impurities and foreign matter are introduced into the canned products in which the salt tablets are deposited, to the detriment of such products, and this condition is normally not discovered until after the cans are opened by the ultimate consumer, at which time it is impossible for the canner to tell what salt tablets were used in the particular can. In such cases, the blame will be attached to the defendant's machine with a corresponding loss of good-will on the part of International Salt (R. 19).

Specification of Errors, Statement of Issues, and Summary of Argument

In No. 1 appellant assigns as error the granting of the plaintiff's motion for summary judgment (R. 40).

In No. 2 it assigns as error the holding of the District Court that defendant has entered into contracts in restraint of trade, and has used patents and patent rights owned or controlled by it to restrain interstate trade and commerce in rock salt and salt tablets, in violation of Title 15, U.S.C. Sec. 1 and 15 U.S.C. Sec. 14 (R. 40).

In No. 3 it assigns as error the holding of the District Court that all the provisions of the leases of the Lixator and Saltomat machines containing provisions against the lessees using or dealing in salt of a competitor or competitors of the defendant are unlawful, illegal and void (R. 40).

In No. 11 appellant assigns as error the provisions of Paragraph VI of the judgment directing defendant to offer to lease or sell or license the use of the Lixator or Saltomat or similar machine to any applicant on non-discriminatory terms and conditions, and subject to the provisions contained in said Paragraph VI (R. 41).

The appellant intends to urge the foregoing assignments of error upon this appeal.

The contention of the appellant is that there are issues of fact involved on which the defendant is entitled to a trial, viz: (1) whether the Lixator and Saltomat leases do in fact substantially lessen competition or tend to create a monopoly in salt, and (2) whether the restraint of trade effected by these leases, if any, is an unreasonable restraint. In the event that this Court should disagree with appellant's contention, and find that summary judgment was properly granted, appellant objects to the provisions of Par. VI of the judgment appealed from (R. 38) on the ground that the District Court in Par. VI of the judgment exceeded its powers, that the provisions of said paragraph are punitive and not remedial, and that if the granting of such relief was within the power of the District Court it was an abuse of the Court's discretion.

The Statutes

Sec. 1 of the Sherman Anti-Trust Act (26 Stat. 209; 15 U.S.C. Sec. 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal; * * *".

Sec. 3 of the Clayton Act (38 Stat. 730; 15 U.S.C. Sec. 14) provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

ARGUMENT

I

The Lixator and Saltomat leases do not *per se* violate the provisions of Section 1 of the Sherman Anti-Trust Act or of Section 3 of the Clayton Act.

Rule 56 of the Federal Rules of Civil Procedure, which prescribes the conditions under which summary judgment may be entered, provides:

> "(c) • • • The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if

any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Sherman Act (15 U.S.C. Sec. 1) does not prohibit all restraints of trade or competition, but only such as are unreasonable. The question whether an alleged restraint of trade is reasonable or unreasonable is essentially a question of fact.

In *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 this Court, speaking of the Sherman Act, says (p. 360):

> "* * * The decisions establish, said this Court in Nash *v.* United States, 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' * * *"
>
> "* * * In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' Chicago Board of Trade *v.* United States, supra. The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. * * *"

and at p. 377:

> "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be a 'definite factual showing of illegality'. Standard Oil Co. *v.* United States, 283 U. S. 179 * * *".

See also

> *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

Section 3 of the Clayton Act (15 U.S.C. Sec. 14) makes unlawful a provision in the lease that the lessee shall not use or deal in the goods, wares, merchandise, or other commodities of a competitor or competitors of the lessor only where the effect of such a provision "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." It would appear almost academic that such a question is one of fact.

In *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U. S. 346 at p. 356 this Court interpreted Sec. 3 of the Clayton Act as follows:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to

> reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

Standard Oil Co. v. *Federal Trade Commission* (C.C.A. 3rd Circ.), 282 Fed. 81, involved the legality under the anti-trust laws of the leases of gasoline storage pumps to filling station proprietors, which leases contained a provision that the equipment should be used solely for the storage and handling of motor gasoline purchased by the lessee from the lessor. The Court held that these leases did not violate Sec. 3 of the Clayton Act. At p. 88 of its opinion, the Court says:

> "But the Clayton Act, when it came along, bore upon another phase of the contract, namely, upon the clause which restricts the use of the leased outfit to the product of the wholesaler, thereby, the Commission found, lessening competition and tending to create a monopoly. Such a clause of a contract, commonly known as a tying contract, is to be construed not by its terms alone but by its effect as well. The Act looks particularly to the consequences. * * *".

The provision in the Lixator and Saltomat leases which plaintiff claims to be illegal and invalid is not literally within the prohibition of Sec. 3 of the Clayton Act. These leases do not prohibit the lessee from using or dealing in rock salt or salt tablets purchased from a competitor of the lessor. The provision in the Lixator lease is that the Lixator shall be used for dissolving and converting into brine only those grades of salt purchased by the lessee from the lessor (R. 11), and in the Saltomat lease that the Saltomat shall be used only in conjunction with salt tablets sold or manufactured by, and purchased from the

lessor (R. 13). There is nothing in these leases which prevents the lessee from obtaining a similar machine from any of lessor's competitors or from buying rock salt or salt tablets from any source he pleases and using them in the operation of any other machine or without any machine.

In *Federal Trade Commission v. Sinclair Refining Co.*, 261 U. S. 463, the Sinclair Refining Co., a manufacturer of gasoline, leased underground tanks and pumps to retail dealers at nominal prices, with a provision that the equipment be used only with gasoline supplied by the lessor. The Federal Trade Commission ordered the Sinclair Co. to cease and desist from leasing its tanks and pumps on this condition on the ground that it was violating Federal Trade Commission Act, Section 5, prohibiting unfair methods of competition, and also Section 3 of the Clayton Act. These orders of the Federal Trade Commission were held invalid by four separate circuit courts of appeals, and on appeal to this Court the judgments of the courts below were affirmed; despite the contention of counsel for the Commission that lessees generally did not encumber themselves with more than one pump and that the practical effect of the restrictive covenant was to confine most dealers to the purchase of gasoline from their lessor. At p. 474 of its opinion, the Court, after discussing among others the decision in *United Shoe Machinery Co. v. United States* (*infra*) says:

> "There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the findings nor the evidence show circumstances similar to those surrounding the 'tying' covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline

> and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline with the pump or without the pump, and many competitors seek to supply his needs."

and at p. 475:

> "* * * No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the cross-roads."

In *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, affirming a judgment of the Circuit Court of Appeals for the 7th Circuit, 80 Fed. (2d) 641, the defendant, General Motors Corp. sold Chevrolet cars to its dealers under a contract by which the dealer was required to agree that he would not sell, offer for sale, or use in the repair of Chevrolet motor vehicles and chassis second-hand or used parts, or any part or parts not manufactured by or authorized by the Chevrolet Motor Co., a division of General Motors Corp. This Court affirmed a judgment of the Circuit Court of Appeals holding that this contract provision did not violate Section 3 of the Clayton Act.

The Court below attempted to distinguish the *Sinclair* case on the ground that the pumps in that case were unpatented, whereas the Lixator and Saltomat are patented machines and presumably, therefore, the identical machines could not be procured elsewhere (R. 33). It does not, of course, follow that because a machine is patented no machine capable of doing similar work can be obtained from any one other than the patentee. This is one of the questions of fact on which defendant was entitled to a trial. The Court below also suggested that the pumps in the *Sinclair* case were the vendee's means of resale and there was, therefore, an inducement to obtain additional equipment to satisfy customers' demand for gasoline. We submit that the lessee of a machine to be used in connection with his business would be as anxious to please himself as to please his customers, and that if other rock salt or salt tablets of better quality or at a better price than lessor's were available, the inducement to obtain additional equipment would be equally as great as if the rock salt or salt tablets were being purchased for resale.

The *Sinclair* case, moreover, was not decided on the ground that the so-called "tying" clause in the gas pump leases aided in preventing a fraud on the public, nor has the *Sinclair* case ever been distinguished by this Court on that ground.

International Business Machines Corp. v. *United States*, 298 U. S. 131 is cited in the opinion below as having "severely restricted" the holding of the *Sinclair* and *Pick* cases (R. 32). In the *International Business Machines* case, appellant's machines and those of Remington-Rand were the only ones on the market which performed certain mechanical tabulations and computations without any

intervening manual operation (opinion, p. 133). Both of these corporations were defendants in the action, and each leased machines under leases having similar tying clauses. Moreover, the record showed an agreed use of the tying clause by appellant and its only competitors, and an agreement by each of them to restrict its competition in the sale of cards to the lessees of the other (opinion, p. 135). The Court found, under these circumstances and after a trial of the issues, that there was a violation of the anti-trust laws, and distinguished the *Sinclair* case not merely on the ground that the gasoline in that case was for resale, but on the ground that in the *Sinclair* case there was no restraint upon the purchase and sale of competing gasoline (opinion p. 135). Similarly, in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 458, cited by the District Court (R. 35), the record showed that the defendant, United Shoe Machinery Corp. controlled more than 95% of the shoe machinery business in the United States, and that a shoe manufacturer leasing from that company machinery which might be absolutely essential to the prosecution and success of his business could not acquire machinery from a competitor of the appellant under the provisions of the appellant's lease, except at the risk of forfeiting the right to use the appellant's machines.

See also

Standard Oil Company v. *Federal Trade Commission* (cited *supra*), 282 Fed. 81, 88.

Plaintiff in the court below relied strongly on *Morton Salt Company* v. *G. S. Suppiger Co.*, 314 U. S. 488, and *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661.

The *Morton Salt* case was an action by Morton Salt Co. against G. S. Suppiger Co. for the infringement of a patent and an accounting. The defendant, Suppiger Co., set up the defense that respondent was making use of the patent to restrain the sale of salt tablets in competition with its own sale of unpatented tablets by requiring licensee to use with the patented machines only tablets sold by Morton Salt Co. Defendant moved for summary judgment, which was granted by the District Court. The Court of Appeals for the 7th Circuit reversed (117 Fed. (2d) 968), and denied the motion on the ground that there was no showing on the record before the Court that the use of the leases in question had substantially lessened competition or had tended to create a monopoly. At p. 971 of its opinion, the Circuit Court of Appeals said:

> "• • • Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, upon which defendant-appellee particularly relies, makes unlawful the lease of machinery (either patented or unpatented) on condition that the lessee shall not use the supplies or other commodities of a competitor. However, unlawfulness is made to depend upon a provision which is here important,—where the effect of such lease or such condition may be substantially to lessen competition or tend to create a monopoly in any line of commerce.
>
> Appellant's agreement falls within the condemnation of this statute if its leases substantially lessen competition or tend to create a monopoly. It is in respect to this last requirement that our attention must be focused. In short, does the condition in plaintiff's leases tend to create a monopoly or substantially to lessen competition? • • •"

The Court then cited *Standard Oil Co.* v. *United States*, 283 U. S. 163 to the effect that the existence of a monopoly,

as a result of the defendant's acts, or the fact that competition was actually lessened as a result thereof must be factually proven. It cited the contention of plaintiff that plaintiff's machine was not the only available machine for the deposit of salt tablets of predetermined amount in the canning or other industries; that plaintiff's lessees were permitted by the terms of the lease to purchase and use other machines, and to use in connection with such other machines any salt or salt tablets which they desired, and that the volume of all the salt business was very large, the amount of salt used in the canning field being so small that its complete control would not result in a monopoly of the salt industry. It concluded as follows (p. 972):

> "* * * Due to the District Court's entry of its decree in a summary proceeding, we are not able to determine the monopolistic extent of plaintiff's contract. The court was clearly in error in granting this summary judgment without an inquiry into the facts. Unless the defendant can make 'a definite factual showing of illegality' arising from plaintiff's agreement with its licensee, it is not entitled to judgment of dismissal. The presence of such a factual issue, ordinarily, is a bar to the granting of a summary judgment. * * *"

This Court reversed the Circuit Court of Appeals, but specifically did not decide whether the respondent's leases violated the Clayton Act, holding that it was not necessary to decide that question in an action involving only the rights of a patent owner against an infringer (314 U. S. 490, 494).

The Court below recognized that this Court in the *Morton Salt* case had not passed on the issue as to the

violation of the Clayton Act (R. 30). He quoted, however, extracts from the opinion in *Mercoid Corp.* v. *Mid-Continent Investment Co.* (*supra*) containing statements not necessary to that decision, as indicating a trend on the part of this Court toward the contention of the plaintiff below (R. 31).

However, in *Transwrap Corp.* v. *Stokes Co.* (1947), 329 U. S. 637 decided since the opinion of the Court below was filed, this Court has made it plain that the *Morton* case did not decide any issue involving the anti-trust laws. At p. 641 of its opinion in the *Transwrap* case, this Court says:

> "* * * The requirement that a licensee under a patent use an unpatented material or device with the patent might violate the anti-trust laws but for the attempted protection of the patent. * * * The condemnation of the practice, however, does not depend on such a showing. Though control of the unpatented article or device falls short of a prohibited restraint of trade or monopoly, it will not be sanctioned. Morton Salt Co. *v.* Suppiger Co., supra. * * *"

and at p. 645:

> "* * * It is true that for some purposes the owner of a patent is under disabilities with which owners of other property are not burdened. Thus where the use of unpatented materials is tied to the use of a patent, a court will not lend its aid to enforce the agreement though control of the unpatented article falls short of a prohibited restraint of trade or monopoly. Morton Salt Co. *v.* Suppiger Co., supra. * * *"

The Court below erred in granting summary judgment, therefore, in the absence of a factual showing that the

Lixator and Saltomat leases had effected an unreasonable restraint of trade, or a substantial lessening of competition.

II

The record in this case did not justify the granting of summary judgment.

The Court below, in deference to the decisions of this Court in *Federal Trade Commission* v. *Sinclair Refining Co., supra,* and *Pick Mfg. Co.,* v. *General Motors Corp., supra,* did not hold that the Lixator and Saltomat leases were unlawful *per se,* but based his decision on the fact alleged in the complaint (R. 8) and admitted in defendant's answer (R. 16) that in 1944 defendant, International Salt, sold approximately 119,000 tons of salt having an approximate value of $500,000 for use in said Lixator and Saltomat machines. The finding of the Court on which the judgment below is based is "that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable and the lessening of competition on its face substantial" (R. 32).

We submit that this one allegation as to the number of Lixator and Saltomat machines leased and the quantity of salt sold by defendant for use in said machines in a particular year is totally inadequate to sustain the summary judgment, especially in view of the other facts in the record which, for the purposes of this appeal, must be deemed admitted. In this connection, it must be borne in mind that four of the Lixator leases contained no "tying clause," and that in nine of said leases the clause permitting removal of the Lixator in the event of viola-

tion by the lessee of the agreement to use in the Lixator only salt purchased from the lessor is omitted or stricken out. How much of the salt sold by defendant in 1944 to Lixator users was sold to these lessees does not appear, nor does it appear how much of this salt was sold in the form of rock salt to Lixator users, and how much in the form of salt tablets to Saltomat users. Moreover, the record shows that in many instances lessees of the Lixator and of the Saltomat have purchased rock salt and salt tablets for use in such Lixator or Saltomat, respectively, from sources other than the defendant, International Salt (R. 17). The quantity of salt sold by defendant's competitors to defendant's lessees for use in these Lixator and Saltomat machines would be highly pertinent in determining the extent, if any, to which these leases have effected a lessening of competition.

Another factor is the total quantity of salt sold by defendant and other salt manufacturers for use in these and other similar machines, and the percentage of such total sold by defendant, International Salt. The fact that International Salt is the largest producer in the United States of salt for industrial uses (R. 14) does not indicate what percentage of the salt sold for such uses is sold by this defendant, or establish that it dominates or controls the salt industry. That would depend on the number of other salt manufacturers and the quantities sold by them. *B. S. Pearsall Butter Co. v. Federal Trade Commission*, (C.C.A. 7th Circ.) 292 Fed. 720, 722.

These questions the defendant is entitled to have determined on a trial of this action by reason of its denial of the allegations of the complaint, on which the plaintiff has the burden of proof, charging restraint of trade by the defendant and a sustantial lessening of competition

as a result of the Lixator and Saltomat leases (Complaint, R. 5, 7, 8; Answer, R. 15, 16).

Both the Lixator and Saltomat leases contain provisions giving to the lessee the benefit of any price reductions in rock salt or salt tablets. The clause in the Lixator lease is as follows (R. 11):

> "If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

The Saltomat lease provides (R. 13):

> "If, at any time during the term of this lease, a general reduction in Lessor's price of salt tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

It may be true that the fixing of prices is not the only means of violating the anti-trust laws (R. 32 footnote), but in determining whether a particular lease or contract violates these laws the effect on prices is highly relevant. On the facts in this record, so far as the Lixator leases are concerned at any rate, it can only be presumed that they have had no effect in increasing or maintaining the price of salt. In the absence of such an effect, the Court

is not justified in finding, as a matter of law, that there has been an unreasonable restraint of trade or a substantial lessening of competition as a result of these leases. All the allegations of illegality or wrongdoing made in the complaint are denied by defendant, which alleges (without denial on this record) that it had no purpose or intent to create a monopoly in the sale of rock salt or salt tablets, or to restrain trade or commerce in those products, but only to secure for itself the opportunity to meet competitive prices (R. 16).

The record further shows that the defendant, International Salt, has never acted oppressively toward its lessees or prospective lessees; that it has never refused to install a Lixator or a Saltomat because the customer objected to signing a lease on the standard form; that it has in many instances sold Lixators outright where a customer objected to leasing the machine, and that it has never removed or attempted or threatened to remove a Lixator or Saltomat from the possession of a lessee, although in many instances lessees of these machines have purchased rock salt and salt tablets for use in such machines from sources other than the defendant, to the defendant's knowledge (R. 16, 17).

While any of these facts standing alone might not be conclusive in determining whether there has been an unreasonable restraint of trade or a substantial lessening of competition, all of them have a bearing on the question whether the effect of the Lixator and Saltomat leases entered into by the defendant has been unreasonably to restrain trade or commerce in rock salt or salt tablets or substantially to lessen competition or tend to create a monopoly. The presence of all these factors raises issues of fact on which the defendant is entitled to a trial.

The answer also alleges that the rock salt produced by the defendant has a higher average Sodium Chloride content than the rock salt produced by other mining concerns, and that rock salt of a lower Sodium Chloride content contains more insoluble impurities which interfere with the operation of the Lixator machine and prevent it from operating in a manner satisfactory to the lessee; also that the use of the less pure salt produced by other concerns affects adversely the amount of concentrated brine which the Lixator produces (R. 17, R. 18).

As to the Saltomat machine, the answer also alleges that the salt tablets manufactured by defendant are made from high purity evaporated salt made especially to meet the requirements of the canning industry, and contain a minimum of impurities such as Calcium Sulphate which, when used in the processing of vegetables, causes a hardening of the skin of the vegetable which is objectionable to the consumer; also that the container used by the defendant, International Salt, for its salt tablets are especially prepared with a glazed interior surface to prevent the salt tablets, when moist, sticking to the side of the container and picking up impurities which are, in turn, transmitted into the can of vegetables in which the salt tablets are deposited (R. 18, 19).

These allegations are made in defendant's answer in support of its contention that the restrictive clauses in the leases are necessary for the satisfactory operation of the machines and the protection of the defendant's goodwill.

The Court below in his opinion twice calls attention to the fact that these allegations of the answer are not supported by affidavit (R. 34, 35). The plaintiff submitted no affidavits in support of the allegations of the complaint

charging violation by the defendant of the anti-trust laws. There was no occasion, therefore, for the defendant to support by affidavit facts which had already been pleaded in the answer. The pleading of these allegations was sufficient to raise an issue and to permit the facts alleged to be proven on the trial. On a motion for summary judgment the court is not concerned with deciding questions of fact or questions of credibility.

> "If there is a genuine issue as to a material fact, the case will go to trial".
>
> *3 Moore's Federal Practice*, §56.01, p. 3175.

The lower court further held (R. 35) that these allegations showing that the use of the defendant's salt is necessary to the satisfactory operation of the Lixator and Saltomat machines, if true, did not constitute a valid defense, citing *International Business Machines v. United States, supra*, at p. 138. The defendant in that case did not contend that cards suitable for use in the defendant's machines and meeting all the requirements of its machines could not be obtained from others than the defendant. On the contrary, it affirmatively appeared by stipulation that others were capable of manufacturing cards suitable for use in defendant's machines, and that paper required for that purpose could be obtained from the manufacturers who supplied defendant (298 U. S. at p. 139).

The answer in the case at bar alleges, and for the purposes of the record it is admitted, that only the salt manufactured by the defendant can be used satisfactorily in defendant's machines because of its purity and high Sodium Chloride content (R. 18, 19). We do not contend, of course, that these allegations have been proven, but

they do raise an issue as to the reasonableness of the restrictions in the lease agreements on which the defendant is entitled to a trial. (*Pick Mfg. Co.* v. *General Motors Corp., supra; American Optical Co. v. New Jersey Optical Co.*, 58 Fed. (Sup.) 601, 605).

The anti-trust laws are criminal statutes. Violators may be fined and imprisoned, and are also subject to severe penalties such as claims for treble damages. It is not in conformity with our system of jurisprudence that a defendant should be found guilty of a violation of these statutes without a full and fair opportunity, upon a trial of the action, to introduce any evidence bearing on the question whether there has been a restraint of trade or lessening of competition and, if so, whether it is of such character and extent as to come within the prohibition of the anti-trust statutes. The judgment in the case at bar, while in form a summary judgment, is in reality a judgment on the pleadings. The finding that the Anti-Trust Laws have been violated is not justified by the scanty record before the District Court.

III

The provisions of Paragraph VI of the judgment should, in any event, be modified.

Paragraph VI of the judgment reads as follows:

> "Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States

embodying inventions covered by any of the patents referred to in Paragraph II hereof, to any applicant on non-discriminatory terms and conditions; provided that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph."

We urge upon the Court that the judgment be reversed, but if there should be an affirmance the provisions of Paragraph VI should, in any event, be modified.

Under the provisions of this paragraph, if the defendant sells or leases or licenses the use of a Lixator or Saltomat to one applicant, it must sell or lease or license the use

of such machine, as the case may be, to any subsequent applicant on the same terms. The sales price or rental or royalty must be the same to all purchasers, lessors, or licensees. The only exception is that it may demand cash payment or security from any applicant not having a proper credit rating, and that it need not accept an applicant's offer if no machine is available. Once having sold, leased, or licensed the use of a machine, the only way that defendant may relieve itself of the obligation to sell, lease, or license future applicants is to get rid of all its available machines and discontinue that department of its business.

A Federal Court, in framing a decree in an anti-trust action, exercises a jurisdiction which is "remedial, not punitive" (*United States* v. *American Can Co.*, 234 Fed. 1019), and "is to be exercised according to the general principles which govern the granting of equitable relief" (*DeBeers Consolidated Mines Ltd.* v. *United States*, 325 U. S. 212, 218).

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 412, the decree forbade any disposition or transfer by the defendant of patented glassware machinery, except by an outright sale. This provision of the decree was eliminated by this Court on the ground that it, in effect, confiscated the defendant's property and went beyond what was necessary to accomplish the purpose of the decree, which was to dissolve the existing combination and prevent future combinations of like character.

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728, Government counsel asked this Court to direct the inclusion in the decree of a requirement that defendant, Soft-Lite Co., file with the District Court a written instrument providing that it would sell its product without discrimination to any person offering to pay cash

therefor. This Court refused to grant the Government request, and indicated its unwillingness, except in the case of absolute necessity, to deprive the defendant of the privilege of selecting its customers.

In the case at bar there is no combination or conspiracy to be dissolved or broken up, and there is a total absence of proof of any oppressive conduct by the defendant toward the lessees of its machines. The paragraph objected to was inserted in the judgment ostensibly for the purpose of protecting existing or future holders of Lixator or Saltomat leases against discriminatory conduct on the part of defendant, if they elected to purchase salt from defendant's competitors. In the first place, there is no reason to assume that any such discriminatory measures would be taken by defendant. The record shows, in fact, that it has never taken advantage of the removal clause in the Lixator or Saltomat leases even though, in many instances, lessees have purchased salt from others to defendant's knowledge (R. 17). Nor has defendant ever refused to install a Lixator or Saltomat, because a customer objected to signing a lease containing the restrictive covenant complained of by plaintiff.

Moreover, full protection against discrimination could be afforded to lessees by eliminating the present Paragraph VI of the decree, and adding at the end of Paragraph IV, containing the injunctive provisions, a new clause (g) enjoining the defendant, its directors, officers, etc. as in Paragraph IV (R. 37):

> "(g) From refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation,

against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

A substantially similar clause was in the form of judgment proposed by the defendant in the District Court, but was not adopted by that Court. Furthermore the District Court has retained jurisdiction of the cause (R. 39), and if it should develop that further protective provisions are necessary they can be incorporated in the decree on application of the Government at any time.

Paragraph VI of the judgment would be a real handicap to the defendant, International Salt, in the conduct of its business. For instance, in some sections of the country, sellers of salt have established the practice of furnishing their customers with a rock salt dissolver which performs a function similar to that of the Lixator, and which is furnished at a nominal rental or without charge, the purpose being to build up good-will with the customer and acquire new business. Defendant will not be able to compete in this territory, if Paragraph VI of the judgment remains in effect, as it would be required to charge a uniform rate for the rental of the Lixator, and could not reduce its rate to meet competition in a particular territory. The result would be to lessen competition in those sections, rather than to maintain or increase it in accordance with the purpose of the Anti-Trust Laws.

The Clayton Act itself, 15 U.S.C. Sec. 13(b), permits a seller charged with price discrimination to rebut the charge by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers

was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. The judgment in this case should not prevent the defendant from exercising or practicing a type of discrimination which the anti-trust statutes recognize as justifiable and legal.

CONCLUSION

The judgment of the District Court should be reversed, the motion for summary judgment denied, and the cause remanded to the District Court for trial. If the judgment should be affirmed, the provisions of Paragraph VI should be modified as urged by the appellant.

Respectfully submitted,

LEMUEL SKIDMORE,
Counsel for
INTERNATIONAL SALT COMPANY, INCORPORATED.

LOUIS H. HALL,
HOWARD F. ORDMAN,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 15 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

INTERNATIONAL SALT COMPANY, INCORPORATED, *Appellant*, *against* UNITED STATES OF AMERICA.	No. 46.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

A

In its preliminary statement the brief for the United States recognizes the fact that "although in form the case arises on motion for summary judgment, in fact the procedure was more in the nature of a motion for judgment on the pleadings". The burden of proof of a violation of the Anti-Trust laws is on the plaintiff. It must prove by a preponderance of the evidence that the effect of the Lixator and Saltomat leases made by the defendant, International Salt, was unreasonably to restrain trade or commerce or substantially to lessen competition.

Under the denials in its answer defendant may prove any fact bearing on the issue whether the restraint of trade or

commerce effected, if any, was reasonable or unreasonable, or whether competition was substantially lessened as a result of said leases. The brief for the United States several times makes the statement that certain facts have not been alleged by the defendant or do not appear in the record (Br. pp. 16, 34, 35, 48). It was not necessary for the defendant to allege evidentiary facts bearing on the issues raised by the allegations of the complaint and the denials in the answer. If any fact provable under the defendant's denials would raise an issue of fact as to the reasonableness or unreasonableness of the restraint of trade, if any, effected by the defendant's leases, or as to whether they effected a substantial lessening of competition, then the defendant is entitled to a trial and an opportunity to submit its evidence.

In only one case, so far as we have been able to find, has a summary judgment in an Anti-Trust suit been upheld by this Court. In that case (*Associated Press* v. *United States*, 326 U. S. 1) one of the appellants contended that summary judgment should have been granted to the plaintiff, thus conceding that summary proceedings were properly utilized in the case, and none of the appellants pointed to any disputed facts creating a triable issue (Opinion, p. 5). This Court, moreover, at page 6 of its opinion stated:

> "* * * We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. Sartor *v.* Arkansas Natural Gas Corp., 321 U. S. 620."

Also, as appears from the opinion of the District Court (52 Fed. Supp. 362, 364), evidence in the *Associated Press* case had been taken in the form of interrogatories, admis-

sions under Rule 36, examinations before trial and affidavits, and the motion for summary judgment was based upon all of these. We find no case, and we venture to say there is none, in which judgment on the pleadings has been granted in a case of this kind.

Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U. S. 488, stressed by Government counsel, does not present, as they contend, "a factual situation almost identical with the instant case". One very important feature of this case was missing in the *Morton* case, namely, the provision in the Lixator lease protecting the customer in the event of a general reduction in the price of salt, and the provision in the Saltomat lease giving the lessee the benefit of any general reduction in lessor's price of salt tablets. It cannot be disputed that one of the principal objects of the Anti-Trust laws is to prevent the fixing of prices and the elimination of price competition. Under the Lixator lease, at any rate, price competition is specifically preserved. If the price of salt declines, the lessor must meet the lower price or the lessee may buy elsewhere. While this one factor may not in and of itself be sufficient to prevent these leases from violating the statute when all the other facts are known, nevertheless with this provision in the lease it cannot be said that the lease *per se* violates the statute. The other facts bearing on the case must first be heard and the factual issues determined on a trial.

Mercoid Corp. v. *Mid-Continent Investment Corp.*, 320 U. S. 661, and *Mercoid Corp.* v. *Minneapolis-Honeywell*, 320 U. S. 680, are not authority for sustaining the judgment on the pleadings which has been granted in the case at bar. In the *Mercoid* cases, the factual issues had been tried and decided against the respondent by the District Court. The Circuit Court of Appeals reversed and held that, as a

matter of law, the respondent had not attempted illegally to extend the scope of the patent. This Court disagreed and reversed the Circuit Court. No question of summary judgment was involved, and certainly no question of judgment on the pleadings.

United States v. Yellow Cab Co. No. 1035, October Term 1946, cited in the Government brief, involved only the sufficiency of the complaint. Defendant had moved in the District Court to dismiss the complaint, which motion was sustained, and an appeal taken direct to this Court. The question involved in that case was whether the complaint stated facts sufficient to constitute a claim. This Court held that the allegations as to the amount of interstate trade affected were sufficient to sustain the complaint, which is a very different thing from holding that the facts stated showed a violation of the Sherman Act sufficient to sustain summary judgment, or judgment on the pleadings. The complaint, moreover, alleged that the result of the restrictive agreement complained of was that the operating companies must pay more for cabs than they would otherwise pay, and the Court pointed out that the operating companies were injured by the agreement "to the extent that the controlled operating companies are charged higher than the open market price" (Law Ed. Advance Opinion, Vol. 91, pp. 1599, 1600, footnote 5).

The Government alleges (Br. p. 30 *et seq.*) that the public policy which prohibits abuses of the patent privilege through extension of the patent monopoly beyond the confines of the grant and the public policy of the Anti-Trust laws are the same, and that, therefore, the cases, such as *Corbice Corp. of America* v. *American Patents Development Corp.*, 283 U. S. 27, and the *Morton Salt* case, which have upheld in actions for infringement of patent a defense that

the patent owner has abused his patent right by attempting to extend the scope of the patent monopoly are authorities for the Government's contention that such an attempt constitutes a violation of the Anti-Trust laws. It would seem a sufficient answer to this argument that this Court, in the *Morton Salt* case, while upholding the defense of the abuse of the patent, twice stated in its opinion that it did not decide the question whether the Anti-Trust laws had been violated. If the abuse of the patent complained of necessarily constituted a violation of the Anti-Trust laws, these statements of the Court would have been superfluous.

Moreover, in *Transwrap Corp.* v. *Stokes Co.*, 329 U. S. 637, decided this year, this Court twice stated in its opinion (pp. 641, 645) that the Court would not lend its aid to enforce an agreement where the use of unpatented materials is tied to the use of a patent "though control of the unpatented article falls short of a prohibited restraint of trade or monopoly", citing *Morton Salt Co.* v. *Suppiger Co., supra.*

The cases cited by the Government, therefore, in which the Court refused to entertain a claim for infringement because of an alleged abuse of the patent monopoly by the use of a so-called "tying" agreement, do not support the judgment in the case at bar.

Government counsel contends (Br. p. 47) that the proportion of the commerce in rock salt and salt tablets affected by the Lixator and Saltomat leases is immaterial citing *Oxford Varnish Corp.* v. *Ault Wiborg Corp.*, 83 Fed. (2d) 764. In that case, the Circuit Court of Appeals made the statement that it was aware of no pronouncement that proportions are "conclusive" (opinion p. 766). The proportion of the trade in rock salt and salt tablets affected by these leases, however, is a relevant factor in determin-

ing whether the restraint of trade and commerce is unreasonable and whether competition in these products has been substantially lessened, and these facts should be before the District Court before a determination is made as to the legality or illegality of the leases in question.

Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346, 357;
International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 298;
B. S. Pearsall Butter Co. v. *Federal Trade Commission*, 292 Fed. 720, 722.

No appeal was taken in the *Oxford Varnish Co.* case, and so far as we can find it has not been cited in any of the decisions of this Court.

B

The brief for the United States, (Br. p. 45, footnote 14) states, referring to *International Business Máchines Corp.* v. *United States*, 298 U. S. 131, that "In that case, as in this one, there was nothing to prevent the lessee from also leasing machines from other manufacturers and from using other cards in such machines". The facts in the opinion in the *International Business Machines* case do not support that statement. It appears from the opinion (p. 133) that Remington Rand was the only other manufacturer of machines comparable to those of International Business Machines Corp. On page 136 of the opinion the Court speaks of Remington Rand as appellant's "only competitor". Remington Rand was a defendant in the suit, and one of the objects of the action was to declare invalid under the Sherman Act a contract entered into by appellant International Business Machines Corp. with Remington Rand

and two other defendants, by which each agreed to use the type of lease used by International Business Machines Corp. and not to solicit the lessees of the machines of the others to purchase tabulating cards (Opinion, p. 132). The other two defendants had been eliminated from the suit, one by dissolution and the other by merger with International Business Machines Corp. (Opinion, p. 133). The record in that case showed, therefore, that the only other source from which a lessee could lease a comparable machine was Remington Rand, and the tie-in between Remington Rand and International Business Machines Corp. with respect to their dealings with each other's customers made it at least, speculative whether a lessee from International Business Machines Corp. could have leased a machine on satisfactory terms from the sole competitor, Remington Rand.

These facts distinguish the *International Business Machines* case from the *Sinclair* and *Pick* cases[1], and these cases are not in conflict.

The facts in the case at bar, which appellant is entitled to prove under the general denial in its answer, more closely resemble the facts in the *Sinclair* case. The brief for the United States attempts to distinguish the *Sinclair* and *Pick* cases on the ground that in each of them it clearly appeared that similar products could readily be obtained elsewhere. The same fact will appear in the case at bar, if the appellant is permitted to go to trial. There are a number of other machines available for lease from other manufacturers which perform a function similar to that of the Lixator, and which can be leased on comparable terms. Another ground of distinction alleged by govern-

1. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463. *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, affirming 80 Fed. (2d) 641.

ment counsel is that in the *Pick* case the record showed that competition in the sale of replacements parts for automobiles, instead of growing less, had substantially increased through the period during which the provisions complained of had been in force (80 Fed. (2d) at p. 644). The same fact may also appear in this case, and defendant is entitled to submit proof on that point on a trial of the action under its denial of the plaintiff's allegations that competition has been substantially lessened as a result of the defendant's leases.

In the *International Business Machines* case, this Court did not hold that under no circumstances would the lessor of a patented machine be entitled to restrict its lessee to a use of a particular product for the purpose of protecting the lessor's good-will. What the Court held was that the restriction made in the leases of International Business Machines Corp. was not necessary for that purpose (opinion p. 140). The decision in each case should, we submit, be based on the facts of that particular case.

The Lixator machine is in competition not only with other machines which perform the function of producing brine from rock salt, but also with machines which produce brine from evaporated salt. Evaporated salt is pure Sodium Chloride, whereas rock salt, being of lower grades and a cheaper product, contains impurities which in the process of producing brine form a sludge which must be disposed of, if the machine is to operate properly. In distributing its Lixators, appellant advises its lessees as to certain fixed intervals at which the sludge disposal should be operated, these intervals being based on the chemical content and analysis of the rock salt produced by defendant which is consistently high in Sodium Chloride content and contains a lesser amount of insoluble impurities than the rock salt produced by other mining concerns (R. 17, 18).

Because the Lixator is in competition with the machines which produce brine from evaporated salt, and because the idea of producing brine from rock salt rather than the high priced evaporated salt is a comparatively novel one which must be "sold" to brine users hitherto accustomed to the use of evaporated salt, which because of its purity has no sludge disposal problems, it is extremely important that each Lixator machine should operate satisfactorily in the production of brine, and should not only produce brine of uniform quantity and concentration, but should do so with the minimum of complication due to the accumulation of sludge from the rock salt and its removal by means of the Lixator sludge disposal device.

That these Lixator machines should operate to the satisfaction of the brine manufacturers to whom they are leased is also to the public interest. If brine manufacturers can be "sold" on the idea of using rock salt instead of the higher priced evaporated salt for the production of brine, the result will be a reduction in the cost of brine which will be reflected in the lower cost to the public of products in which brine is used.

These are all facts which can be established, and which plaintiff is entitled to establish under its general denial. With these facts established, there will be a decided question whether the Lixator leases, at any rate, with the restrictive provision complained of, have resulted in a substantial lessening of competition, or whether the restraint of trade effected, if any, is unreasonable.

American Optical Co. v. *New Jersey Optical Co.*, 58 Fed. Supp. 601, 605.

C

The Government objects to any change in the provisions of Paragraph VI of the judgment, although it states (Br. p. 54, footnote 19) that if the need arose the Government would not oppose permitting appellant to charge a lower price in order to meet, in good faith, the equally low price of a competitor.

The need has already arisen and will, no doubt, arise many times in future. The suggestion that appellant apply to the District Court whenever such an occasion arises is not a practical one. Certainly a customer offered a machine at a nominal rental by a competitor will not wait for a District Court to determine whether the appellant can meet the price.

The Government's only expressed objection to the substitute for Paragraph VI proposed in appellant's main brief (p. 39) is that an injunction against discrimination, such as appellant proposes, would require an inquiry into the motives of appellant in accepting or refusing applications for machines and would be more difficult for the Trial Court to supervise and police.

The unfairness to the appellant, however, of the present Paragraph VI outweighs this suggested difficulty. It must be considered that appellant has never attempted an attitude of coercion toward the lessees of its machines, that, as appears from the record, it has in many instances sold the Lixator machine outright where the customer has objected to leasing the machine and without any agreement as to the source from which the rock salt for use in the Lixator was to be purchased (R. 16). It has, in some instances, refused to sell a Lixator or a Saltomat machine (R. 16), but it has never refused to install such a machine

because the customer objected to signing a lease on the standard form (R. 17). In many instances, moreover, lessees of Lixator or Saltomat machines have purchased rock salt or salt tablets for use in the leased machines from sources other than the defendant International Salt, to the knowledge of said defendant, and in no instance has International Salt removed or attempted to remove or threatened to remove the machine from the possession of the lessee (R. 17). The Government's brief suggests that this was because appellant knew that the contract was not enforceable, but this suggestion would not explain why there has never been any threat of removal.

In other words, so far as this record shows, there is no disposition on the part of this appellant to coerce a lessee of a Lixator or Saltomat machine into buying rock salt or salt tablets from the appellant if he chooses not to do so. It is a settled principle of equity procedure that an injunction will not be granted against an act which has not even been threatened. By the same token, this appellant should not be penalized because of the possibility of its adopting an attitude of coercion toward lessees or prospective lessees of Lixator or Saltomat machines which would not be in line with its conduct to date as shown by this record.

The fears of Government counsel as to the difficulty of enforcing the alternative injunctive provisions suggested in appellant's main brief are, we believe, entirely unfounded. If International Salt should adopt a policy of coercion towards the lessees of its Lixator or Saltomat machines, as suggested by Government counsel, there would be no lack of complaints on which to base a contempt motion.

D

The judgment of the Court below should be reversed and the case remanded to the District Court for trial. If the judgment should be affirmed, in any event it should be modified to eliminate Paragraph VI and substitute the clause suggested by appellant.

Respectfully submitted,

LEMUEL SKIDMORE,
Counsel for
INTERNATIONAL SALT COMPANY, INCORPORATED.

LOUIS H. HALL,
HOWARD F. ORDMAN,
of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 14 1947
CHARLES ELMORE CROPLEY
CLERK

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1947

INTERNATIONAL SALT COMPANY, INCORPORATED,
APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	11
Argument:	
I. The tying clauses violate Section 1 of the Sherman Act	15
A. Both patent and antitrust cases demonstrate that patent licenses restricting the sale of unpatented articles are unlawful	17
B. License agreements requiring the purchase of unpatented products from a patentee are in and of themselves unreasonable restraints of trade	26
1. The exclusion of competitors from the sale of unpatented articles is similar to other restraints which have been held unreasonable *per se*	26
2. The "rule of reason" does not protect restrictions which have been held contrary to public policy because of their effect upon competition	30
3. The miscellaneous facts stressed by appellant cannot justify the tying clauses	33
C. The facts of record here show that the restraint is unreasonable	41
II. The restrictive agreements are violative of Section 3 of the Clayton Act	43
III. Paragraph VI of the judgment is necessary to insure adequate relief. There was no abuse of the discretion of the District Court	49
Conclusion	56

CITATIONS

Cases:	
American Tobacco Co. v. *United States*, 328 U. S. 781	29
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	16
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344	30, 31

763423—47——1

Cases—Continued. Page

B. B. Chemical Co. v. *Ellis*, 314 U. S. 495 ..... 17, 40
Chicago Board of Trade v. *United States*, 246 U. S. 231 ..... 30, 31
Carbice Corp. v. *American Patents Corp.*, 283 U. S. 27 ..... 17, 18, 29, 31, 39
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 ..... 17, 29, 41
Fashion Originators Guild v. *Federal Trade Commission*, 114 F. 2d 80, affirmed, 312 U. S. 457 ..... 27, 28, 48
Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 463 ..... 23, 24
Hartford-Empire Co. v. *United States*, 323 U. S. 386 ..... 17, 22, 54
Henry v. *A. B. Dick Co.*, 224 U. S. 1 17
International Business Machines Corp. v. *United States*, 298 U. S. 131 ..... 13, 39, 40, 44, 49
Judson L. Thompson Mfg. Co. v. *Federal Trade Commission*, 150 F. 2d 952, certiorari denied, 326 U. S. 776 ..... 41, 45
Leitch Mfg. Co. v. *Barber Co.*, 302 U. S. 458 17
Local 167 v. *United States*, 291 U. S. 293 53
Maple Flooring Association v. *United States*, 268 U. S. 563 31
Mercoid Corp. v. *Mid-Continent Investment Co.*, 320 U. S. 661 ..... 12, 17, 20, 21, 22, 23, 32, 33, 40
Mercoid Corp. v. *Minneapolis-Honeywell Co.*, 320 U. S. 680 ..... 12, 20, 21, 22, 23, 32, 33
Morton Salt Co. v. *G. S. Suppiger Co.*, 314 U. S. 488 ..... 11, 17, 19, 20, 22, 23, 26, 32, 33
Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 243 U. S. 502 17
Nash v. *United States*, 229 U. S. 373 30
Oxford Varnish Corp. v. *Ault & Wiborg Corp.*, 83 F. 2d 764 ..... 34, 47
Pfotzer v. *Aqua Systems*, 162 F. 2d 779 27
Pick Manufacturing Co. v. *General Motors Corp.*, 299 U. S. 3 ..... 23, 25
Radio Corporation v. *Lord*, 28 F. 2d 257, certiorari denied, 278 U. S. 648 ..... 41, 45
Signode Steel Strapping Co. v. *Federal Trade Commission*, 132 F. 2d 48 ..... 45, 48
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U. S. 346 45
Standard Oil Company v. *United States*, 221 U. S. 1 ..... 30, 53
Standard Oil Co. v. *United States*, 283 U. S. 163 31
Sugar Institute v. *United States*, 297 U. S. 553 ..... 30, 31
Transparent-Wrap Machine Corp. v. *Stokes and Smith Co.*, 329 U. S. 637 ..... 22, 26
United Shoe Machinery Corp. v. *United States*, 258 U. S. 451 ..... 35, 36, 37, 46
United States v. *Addystone Pipe & Steel Co.*, 85 Fed. 271, affirmed, 175 U. S. 211 27
United States v. *Aluminum Co.*, 148 F. 2d 416 ..... 27, 29

Cases—Continued. Page

United States v. *Bausch & Lomb Co.*, 321 U. S. 707 ..... 53, 54

United States v. *Crescent Amusement Co.*, 323 U. S. 173 ..... 52, 53

United States v. *National Lead Co.*, 63 F. Supp. 513, affirmed, No. 89, 1946 Term, decided June 23, 1947 ..... 37, 53

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 .. 16, 27, 29

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 53

United States v. *Trenton Potteries Co.*, 273 U. S. 392 27

United States v. *Union Pacific R. R. Co.*, 226 U. S. 470 52

United States v. *Univis Lens Co.*, 316 U. S. 241 41

United States v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947 ..... 11, 16, 34, 42, 47

Window Glass Manufacturers v. *United States*, 263 U. S. 403 .. 31

Statutes:

Clayton Act, 28 Stat. 730, Sec. 3 (15 U. S. C. Sec. 14) .. 3, 43, 45

Sherman Anti-Trust Act, 26 Stat. 209, Sec. 1 (15 U. S. C. Sec. 1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 46

INTERNATIONAL SALT COMPANY, INCORPORATED,
APPELLANT

v.

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 26), is reported in 6 F. R. D. 302 (1946).

JURISDICTION

The judgment of the court below was entered December 27, 1946 (R. 36). The order of that court allowing this appeal was entered January 23, 1947 (R. 42). The jurisdiction of this Court is invoked under Sec. 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. See. 29), and Sec. 238 of the Judicial Code, as amended (36 Stat. 1157, 38

Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345). This Court noted probable jurisdiction on April 28, 1947 (R. 50).

QUESTIONS PRESENTED

The appellant leased its patented machines to many lessees on condition that the lessees use in the machines only the unpatented salt produced by the patentee. The questions are (1) whether such tying clauses are on their face, or *per se*, violative of the Sherman Act, (2) even if not, whether, in view of the substantial magnitude of the restraints, violation of Section 1 of the Sherman Act or Section 3 of the Clayton Act is shown, and (3), whether Paragraph VI of the judgment, imposing upon appellant the requirement that it dispose of its machines in a non-discriminatory manner, was an abuse of the discretion of the District Court.

STATUTES INVOLVED

The complaint, Paragraph 1, alleges that this action is brought under Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209 (15 U. S. C. Sec. 1), and Sec. 3 of the Clayton Act, 28 Stat. 730 (15 U. S. C. Sec. 14). Section 1 of the Sherman Anti-Trust Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *

Section 3 of the Clayton Act provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charge therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT

The United States District Court for the Southern District of New York sustained a motion for summary judgment made by the plaintiff below, United States of America, and enjoined appellant, defendant below, International Salt Company, Incorporated, from further violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act (R. 25, 36).

The facts upon which the District Court granted summary judgment[1] are found in the allegations in the complaint (R. 3), insofar as they are admitted in the answer (R. 14–16); the allegations of the affirmative defense set forth in defendant's answer (R. 16–19); and the admissions made by the defendant, in response to a Request for Admissions filed by plaintiff below, under Rule 36 of the Federal Rules of Civil Procedure (R. 20, 23).[2]

The essential facts are as follows:

Appellant, International Salt, is a New Jersey corporation with offices in New York City. It manufactures and supplies in interstate commerce salt for industrial, agricultural and home purposes (R. 14, 15) and is the largest producer of salt for industrial uses in the United States (R. 14).

It also engages in the distribution of two types of machines, the "Lixator" and the "Saltomat," both of which are manufactured under patents which it owns (R. 4, 23). It leases both machines on condition that the lessees purchase from appellant unpatented salt and salt tablets used in said machines (R. 15, 11–13).

[1] Although in form the case arises on motion for summary judgment, in fact the procedure was in the nature of a motion for judgment on the pleadings.

[2] These include photostatic copies of 50 Lixator leases, made a part of the record and filed with the Court but not printed, which vary from the 790 Lixator leases made on the standard printed form of lease agreement (R. 47–48).

In 1944, appellant sold approximately 119,000 tons of salt having a value of approximately $500,000 for use in said Lixator and Saltomat machines (R. 16). Salt in many respects similar to that made and sold by the appellant is and has been sold by other companies in competition with the salt products of the appellant (R. 15).

The Lixator Leases. The Lixator is a machine manufactured by appellant which dissolves rock salt, sold by appellant and others, into a salt brine solution which is essential in certain industrial processes, such as meat packing, refrigeration, and laundering (R. 4, 14).

Appellant, at the time of the action before the District Court, had entered into 840 agreements, each leasing a Lixator to certain persons and concerns (R. 20, 23). 790 of these agreements were on appellant's standard form (R. 20, 23). See Exhibit A of the Complaint (R. 11). For the 50 non-standard leases, for which the rental appears in the record, the lease was at a specified, and in many cases nominal, annual rental, and after five years was reduced to $1.00 per annum. Lessee was responsible for maintenance and repair.

The standard lease contained the following provisions (R. 11–12):

> * * * that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

> If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price.
>
> * * * * * * *
>
> * * * that should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon thirty days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee.

Of the 50 Lixator agreements which differ from the printed form (R. 20, 23) (R. 47, 48), all but four contain tying clauses requiring the lessee to purchase some or all of the rock salt used in the Lixator from the appellant. The remaining 46 agreements contain modifications of little importance, such as variations in the facilities fur-

nished by lessor, in the rental or cancellation terms, etc. (R. 28, note 3). Three leases permitted lessee to buy 50% of its salt requirements from appellant's competitors, and five, all with one concern, permitted lessee to use salt produced by itself.

Appellant avers that it has sold the Lixator outright in many instances where the customer objected to leasing the machine, and without any restriction on the purchase of the rock salt for use therewith (R. 16), although in some instances it refused to sell machines (R. 16). It denies ever having refused to install a Lixator because the customer objected to signing a lease on the standard form (R. 16, 17), and asserts that in many instances lessees have purchased rock salt elsewhere in violation of the agreement without appellant removing or attempting or threatening to remove the machine from the possession of the lessee (R. 17).

The Saltomat Leases. The Saltomat machine, manufactured for appellant under a patent owned by it (R. 23), is used to inject salt in tablet form into canned products during the process of canning (R. 18). Appellant leases these Saltomats under a standard form of agreement, a copy of which is attached to the complaint as Exhibit B (R. 12–13, 15). At the time this action was before the District Court, appellant had in effect 73 leases covering 96 Saltomats, all in the standard

form (R. 20, 23). The leases were for one year, or part thereof, at a specified rental. Lessee was responsible for maintenance and repair. It was agreed that "the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, * * *." Appellant may terminate the lease on ten days' notice if lessee fails to buy its salt tablets for the Saltomat from it (R. 12–13).

Appellant has in some instances refused to sell Saltomat machines (R. 16), but denies ever having refused to install a Saltomat machine because the customer objected to signing a standard form (R. 16, 17).[6] All leased Saltomats, however, have been leased on the standard form (R. 20, 23), and it is not alleged that any have been sold. Appellant also states that Saltomat lessees have frequently purchased salt tablets from other sources, and that in no such case has appellant removed, or attempted or threatened to remove, the machine from the possession of such lessees (R. 17).

The standard lease contained the following provision:

[6] There is no allegation that any lessee of the Saltomat ever has objected.

> If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price.

The answer also alleges that appellant produces rock salt with a minimum of impurities, that such salt can be used more successfully in the two types of machines, and that to permit salt produced by others to be used in the machines will cause a loss of appellant's good will (R. 17–19).[4]

The Judgment. The District Court found that the provisions of the leases covering the Lixator and Saltomat machines which contained any conditions, agreements or understandings prohibiting the lessee from using or dealing in the salt of appellant's competitors were violative of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and declared them illegal and void (R. 36, 37).

The court enjoined appellant from: (a) enforcing or attempting to enforce such provisions; (b) entering into any agreements for said machines, or similar machines, upon the condition that the user shall not purchase, use or deal in the salt of a competitor of appellant; (c) participating in agreements which continue any agreement, condition, or understanding adjudged

[4] These facts are discussed at greater length, *infra*, pp. 34–41.

to be unlawful by this judgment; (d) removing said machines from the user's premises because of such user's purchase or use of salt manufactured or sold by anyone other than appellant; (e) using its patent rights embodying inventions used or useful in said machines to control the purchase of salt from anyone other than appellant; (f) instituting or threatening action for infringement, or to collect sums alleged to have accrued prior to the entry of said judgment under any United States patents owned or controlled by appellant relating to said machines or similar machines (R. 37–38).

Appellant is also directed (par. VI, R. 38–39) to lease, sell or license Lixator or Saltomat machines (or similar machines) to any applicant on non-discriminatory terms or conditions, subject to the following provisos: (a) that machines are available for such purposes; (b) that appellant need not make such offers unless it is offering such machines for lease or sale or license within the United States, and defendant may at any time discontinue the business of renting, selling or licensing the use of such machines; (c) that such sale, lease or license need not be made to any person not having the proper credit rating except on a cash or security basis; and (d) that the rental or sale price or royalties may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as

to any size or type of machine (R. 38–39). Any existing lessee may elect to retain its rights under the existing lease or enter into a new lease, sale or license contract with appellant in accordance with the provisions of this paragraph VI of the judgment (R. 38–39).

The United States asked the District Court for additional relief in order to dissipate the effect of the unlawful conduct (R. 9–10, 45). It took an appeal from the failure of the court to grant its requests (R. 44–46), but has since dismissed its appeal.

SUMMARY OF ARGUMENT

I

The tying clauses here unquestionably restrain competition, inasmuch as they prevent anyone from competing with appellant in its sales of salt for use in the leased machines. It is admitted that the trade restrained is interstate. Nor can it be claimed that the amount of commerce affected is unduly small. *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947. The issue under the Sherman Act thus is whether the restraint of trade is unreasonable.

A. In many cases, including the *Morton Salt* case, 314 U. S. 488, which is factually almost indistinguishable from that at bar, this Court has refused to enforce agreements in which owners of patents have attempted to require licensees to purchase unpatented goods solely from them.

Although these are not antitrust cases, the policy which the Court has invoked in deciding them is the same policy against interfering with competition which is embodied in the Sherman Act. And in the most recent of this series of decisions, the *Mercoid* cases, the Court held that use of a patent to control competition in the unpatented article was both unreasonable and unlawful under the antitrust laws. These authorities, in our view, establish that this type of restraint is unlawful on its face under the Sherman Act.

B. Even if the question be regarded as open under the authorities, the same conclusion is required. Methods of restraint which exclude from the market those who would otherwise supply it are unlawful *per se* under the Sherman Act. Price fixing is unlawful *per se* because it *eliminates* competition, and agreements which require the purchase of a commodity from a single producer eliminate competition just as clearly. The "rule of reason" establishes as the criterion whether restraints unduly impair the public interest in a competitive market. The patent cases holding these tying clauses to be unenforceable because contrary to public policy are dispositive of the argument that the same restraint may be "reasonable" under the Sherman Act, inasmuch as the public policies applied in the patent cases and underlying the "rule of reason" are the same.

The miscellaneous facts stressed by appellant do not justify the restriction. Appellant's failure to enforce the leases, or to impose it in all instances, and the provision in the Lixator agreements for meeting general price reductions do not establish effective competition. Nor does the fact that appellant's salt may be purer and for that reason more satisfactory in the machines make the tying clauses necessary for the potection of appellant's good will. The protection of good will in any event does not warrant an otherwise unlawful extension of a patent monopoly over unpatented products. *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 138–139.

C. Whether or not the type of restraint here involved was unlawful *per se*, the fact that appellant, the largest producer of salt for industrial use in the country, has excluded competitors from a market consisting of 119,000 tons of salt annually is sufficient to show a violation of the Sherman Act in the absence of circumstances showing the restraint not to be unreasonable.

II

The tying clauses violate section 3 of the Clayton Act, which forbids the leasing of machinery on the condition that the lessee shall not use the supplies of a competitor where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

763423—47——3

International Business Machines Corp. v. *United States*, 298 U. S. 131, in itself refutes appellant's argument that the section is inapplicable because the restriction in terms only applies to products used in appellant's machines. And there can be no question but that the effect of the tying clauses, which relate to 119,000 tons of salt used by over 900 machines, at least "may be" to substantially lessen competition or tend to create a monopoly. The restraint and monopoly need not be of an entire industry if the amount of trade affected is appreciable.

III

Paragraph VI of the judgment requires appellant to offer to lease, license or sell its machines covered by the patents on non-discriminatory terms so long as the machines are available and appellant is offering to lease, license, or sell them. This provision was necessary to prevent the appellant from using its ownership of the machines to force the purchase of its salt, or to give preference to those who would purchase salt from it. A mere injunction against discrimination would be insufficient, since it would require the difficult inquiry into the motive of appellant in disposing of particular machines. Paragraph VI is not harmful to appellant, since it permits appellant to decide whether it wishes to distribute machinery and the price thereof, so long as it treats all customers equally. It was not arbitrary or

an abuse of discretion for the District Court to find that such an affirmative requirement was essential for the protection of the industry against possible continuation of appellant's unlawful methods.

ARGUMENT

I

THE TYING CLAUSES VIOLATE SECTION 1 OF THE SHERMAN ACT

The foregoing statement of the facts, based on the pleadings and the admissions by appellant, shows that appellant has entered into two series of agreements relating to patented machines for using salt in industrial processes. Each series of agreements contains restrictive clauses requiring the lessee to purchase unpatented salt from appellant for use in the machine, subject to the penalty of cancellation and removal of the machine from the lessee if the lessee fails to comply with the restriction. Appellant has outstanding over 900 of these restrictive agreements. In 1944 appellant sold approximately 119,000 tons of salt, of the value of approximately $500,000, for use in these machines (R. 16). It is apparent that the restrictive provisions in the leases were designed to prevent sales by competitors. The agreements speak of "competitive" salt, and of competitive prices (R. 11).

There can be no question under these facts that the restrictive agreements restrain competition,

inasmuch as they prevent anyone from competing with appellant in its sales of salt for use in the leased machines. There is no dispute as to the trade restrained being interstate, inasmuch as it is conceded that appellant and its competitors ship salt in interstate commerce (R. 15).

Nor can it be claimed that the amount of commerce affected immunizes the restraint. The amount—119,000 tons of salt—is certainly not insubstantial. It is established that "the amount of interstate trade * * * affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged * * *. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59, p. 225; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485. And § 2 of the Act makes it unlawful to conspire to monopolize "any part of interstate commerce," without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. * * *" *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947, slip opinion, p. 6.

The issue in this case is thus reduced to whether the restraint of trade is "unreasonable" within the meaning of the Sherman Act as it has been construed. It is the Government's primary posi-

tion that such a restraint is "unreasonable" on its face, *i. e.*, that it constitutes a *per se* violation of the Sherman Act.

A. BOTH PATENT AND ANTITRUST CASES DEMONSTRATE THAT PATENT LICENSES RESTRICTING THE SALE OF UNPATENTED ARTICLES ARE UNLAWFUL.

Since *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, was overruled by *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, this Court has refused to enforce agreements in which owners of patents sought to require licensees to purchase unpatented goods from them. *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; cf. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 406–407. The patent cases in this series speak in the main of such agreements extending beyond the scope of the patent grant, so that their enforcement is contrary to the public interest. In the *Carbice* case, however, the Court, speaking through Mr. Justice Brandeis, defined the public interest which would be injured in a manner which makes it plain that he regarded it as indistinguishable from the interest protected by the Sherman Act. The opinion states (283 U. S., at 32):

* * * If a monopoly could be so expanded, the owner of a patent for a product might conceivably monopolize the commerce in a large part of unpatented materials used in its manufacture. The owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation. The owner of a patent for a process might secure a partial monopoly on the unpatented material employed in it. The owner of the patent in suit might conceivably secure a limited monopoly for the supplying not only of solid carbon dioxide, but also of the ice cream and other foods, as well as of the cartons in which they are shipped. *The attempt to limit the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of a patentee to fix the price at which the patented article may be resold.* * * *

* * * * *

(p. 34):

* * * The present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned, under the Sherman Anti-Trust Law, in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.*

* In such cases, the attempt to use the patent unreasonably to restrain commerce is not only beyond the scope of the grant, but also a direct violation of the Anti-Trust Acts. * * *

* All italics in this brief are supplied.

The *Morton Salt* case, decided in 1942, presented a factual situation almost identical with the instant case. The patentee in that case had leased patented machines for depositing salt tablets under an agreement that only the patentee's tablets could be used with the machine. This Court dismissed the patentee's infringement action against another maker of machines on the ground that the maintenance of the suit was "contrary to public policy" (314 U. S., at 494). The Court's opinion twice noted that it was "unnecessary to decide whether respondent has violated the Clayton Act" (pp. 494, 490), and these reservations are the bases for appellant's contention that the *Morton Salt* case by itself does not require a decision for the Government in the case at bar. But although the Court in that case did not find it necessary to decide whether the antitrust laws were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act. For the opinion states that it "appears that respondent is making use of its patent monopoly *to restrain competition* in the marketing of unpatented articles, salt tablets, for use with the patented machines, and *is aiding* in the *creation of a limited monopoly* in the tablets not within that granted by the patent." 314 U. S., at 491. The Court subsequently refers to the use of the patent "to suppress competition in the sale of an unpatented article" (*ibid.*), to the use of the

patent "as a means of restraining competition with the patentee's sale of an unpatented product" and as "thwarting the public policy underlying the grant of the patent" (p. 493), and to the restrictive agreement as an "improper practice" and as a "misuse of the patent" (p. 493).*

The door left open in the *Morton Salt* case was, we believe, closed in the *Mercoid* cases. *Mercoid Corp.* v. *Mid-Continent Investment Corp.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680. The *Mercoid* cases differed from the *Morton Salt* case in that in one of them Mercoid was seeking an injunction on the ground that the respondent was using the patent in violation of the antitrust laws (320 U. S., at 681). In the first case the Court followed the *Morton Salt* case in holding that a patentee seeking to control the sale of an unpatented product could not enforce the patent. The opinion states that (p. 667, 670): "But for the patent such restraint on trade would plainly run afoul of the anti-trust laws. * * * Such a vast power 'to multiply monopolies' at the will of the patentee * * * would carve out exceptions to the anti-trust laws which Congress has not sanctioned. * * * Should such a decree be entered, the Court would be placing its imprimatur

* It is to be observed that the *Morton Salt* case was decided upon a motion for summary judgment, and that the opinion does not rely on facts differing in nature from those contained in the record in the case at bar.

on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws. * * *"

The statements in the first case indicating clearly that the misuse of the patent privilege involved was a violation of the anti-trust laws were confirmed by the opinion in the second case, in which the point was squarely raised by reason of Mercoid's prayer for affirmative antitrust relief. The Court there unequivocally stated that (320 U. S., at 684):

> * * * The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. For the reasons stated in *Mercoid* v. *Mid-Continent Investment Co., supra,* the effort here made to control competition in this unpatented device plainly violates the anti-trust laws, even apart from the price-fixing provisions of the license agreements. It follows that petitioner is entitled to be relieved against the consequences of those acts. It likewise follows that respondent may not obtain from a court of equity any decree which directly or indirectly helps it to subvert the public policy which underlies the grant of its patent. * * *

It is to be noted that although four justices dissented in the first *Mercoid* case on grounds unrelated to the point here in issue (320 U. S. 674–680), they joined in the decision in the second case (320 U. S., at 684), on the authority of

the *Morton Salt* case, which would seem to indicate that they regarded that case as controlling in relation to the prayer for injunctive relief under the antitrust laws as well as in relation to the refusal to grant affirmative relief to the misuser of the patent.

The *Mercoid* decisions are the latest cases (apart from *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, which involved other issues) to consider the precise question. Appellant relies, however, on two statements in *Transparent-Wrap Machine Corp.* v. *Stokes and Smith Co.,* 329 U. S. 637.[7] The *Transparent-Wrap* case is obviously not in point here, inasmuch as it involved the validity of a provision in a patent

[7] "* * * The requirement that a licensee under a patent use an unpatented material or device with the patent might violate the antitrust laws but for the attempted protection of the patent. [Citing *Mercoid Corp.* v. *Mid-Continent Corp.*, 320 U. S. at 667.] The condemnation of the practice, however, does not depend on such a showing. Though control of the unpatented article or device falls short of a prohibited restraint of trade or monopoly, it will not be sanctioned. *Morton Salt Co.* v. *Suppiger Co., supra.* For it is the tendency in that direction which condemns the practice and which, if approved by a court either through enjoining infringement or enforcing the covenant, would receive a powerful impetus. *Id.*" (329 U. S., at 641.)

"It is true that for some purposes the owner of a patent is under disabilities with which owners of other property are not burdened. Thus where the use of unpatented materials is tied to the use of a patent, a court will not lend its aid to enforce the agreement though control of the unpatented article falls short of a prohibited restraint of trade or monopoly. *Morton Salt Co.* v. *Suppiger Co., supra.*" (329 U. S., at 645.)

license agreement requiring the licensee to assign improvement patents to the patentee. The holding that such an agreement was not unlawful rested on a specific provision in the patent law making patents assignable. The Court found that the doctrine of the *Mercoid* and *Morton Salt* cases was inapplicable because of this factor. The remarks referred to by appellant, which are quoted in the note on the preceding page, merely state that the courts will not aid in enforcing agreements tying unpatented materials to the use of a patent "though control of the unpatented article falls short of a prohibited restraint of trade or monopoly," citing the *Morton Salt* case. These statements, read in the light of the fact that the Court found it unnecessary to decide the question of antitrust violation in the case cited, would seem to mean only that the Court will not enforce such agreements irrespective of the question of antitrust violation. Such an interpretation of the remarks is obviously most consistent with the unanimous holding of the Court in the second *Mercoid* case, as well as with the implications of the earlier *Carbice* and *Morton Salt* decisions, quoted *supra*, pp. 17–20.

Appellant also relies upon *Federal Tade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, and *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U. S. 3. The trial judge indicated that he would have based his decision in support of the Government on the ground that the "restric-

tive agreements were unlawful *per se*" if it were not for these two cases, which—although he believed the holdings to have "been severely restricted" (R. 32)—he apparently thought left the question sufficiently doubtful to cause him to rely upon a different ground for his decision (R. 32). Even assuming that the cases have continuing vitality they are inapplicable here.

The *Sinclair* case involved unpatented gasoline pumps and gasoline and the *Pick* case unpatented automobiles and automobile parts. In each case it clearly appeared that similar products could readily be obtained elsewhere. In the *Sinclair* case the court pointed out that many competitors produced pumps and that (261 U. S., at 474):

> * * * The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his needs.

(at 475):

> * * * the record does not show that the probable effect of the practice will be unduly to lessen competition. * * *

Finally, as the court below suggested (R. 33):

> * * * although unstated in the *Sinclair* case, it is nevertheless obvious that to allow a gasoline dealer to serve the public, through a Sinclair pump, gasoline other than Sinclair's would amount to cooperation in a fraud.

In the *Pick* case the Court accepted the finding of the two lower courts that requiring Chevrolet and Buick dealers to sell and use only General Motors parts would not be "substantially to lessen competition or to create a monopoly in any line of commerce" within the meaning of Section 3 of the Clayton Act. The Circuit Court of Appeals for the [redacted] Circuit had noted that "the record shows that competition in the sale of replacement parts for automobiles instead of growing less has substantially increased through the period during which the provisions complained of have been in force" (80 F. 2d, at 644). The manufacturer sought no control over any repairmen except its authorized dealers; all others were free to repair Chevrolets and Buicks with any parts they could obtain. In view of the competition from other sources not restricted by patents in both the *Sinclair* and *Pick* cases and the possible misrepresentation to the public, it is clear that those cases in no way resembles that at bar, even if it be assumed that other types of salt machines, not made under appellant's patents and therefore obviously not identical, per-

formed the same functions as appellant's machines.[8]

It is the Government's position that the cases discussed in this section of the brief establish that contractual provisions requiring patent licensees to purchase unpatented products from the patentee are on their face, and without more, violative of the Sherman Act. If it be assumed, however, that the point is not foreclosed by authority but is subject to fresh consideration (in view of the statements in the *Transparent-Wrap* case, *supra*, p. 22), we will show that the result for which we contend is a sound one.

B. LICENSE AGREEMENTS REQUIRING THE PURCHASE OF UNPATENTED PRODUCTS FROM A PATENTEE ARE IN AND OF THEMSELVES UNREASONABLE RESTRAINTS OF TRADE

1. The Exclusion of Competitors from the Sale of Unpatented Articles is Similar to other Restraints which Have Been Held Unreasonable per se

Although the Sherman Act, as construed by the Court, prohibits only "unreasonable" restraints of trade, it is established that certain methods of restraint are *per se* unreasonable. These include not only price fixing (*United States* v.

[8] The record is silent as to the existence of such competitive machinery. The opinion in the *Morton Salt* case indicates that another company was making a machine performing the same functions as the Saltomat. Appellant has not alleged that any other machines are comparable to or equally as good as those covered by its patents.

Socony Vacuum Oil Co., 310 U. S. 150, 212–218; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392), but such other restraints as combination boycotts which exclude persons from the market (*Fashion Originators' Guild* v. *Federal Trade Commission*, 114 F. 2d 80 (C. C. A. 2), affirmed, 312 U. S. 457, 467–468), and agreements not to compete in certain territories (*United States* v. *Addystone Pipe & Steel Co.*, 85 Fed. 271, 291 (C. C. A. 6, Taft, J.), affirmed, 175 U. S. 211; *United States* v. *Aluminum Co.*, 148 F. 2d 416, 427 (C. C. A. 2); *Pfotzer* v. *Aqua Systems*, 162 F. 2d 779, 784 (C. C. A. 2). As Judge L. Hand stated in the *Fashion Guild* case (114 F. 2d, at 85):

> Price fixing is not, however, the only means unlawful per se; the interest of the consumer is not all that determines the "reasonableness" of a contract "in restraint of trade." *It is also unlawful to exclude from the market any of those who supply it*—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain.

And in *United States* v. *Aluminum Co., supra*, Judge Hand, after reviewing the authorities, concluded that a monopoly was also illegal *per se* (148 F. 2d, at 427–428).

We submit that the use of a patent monopoly to prohibit those who desire the patented device from purchasing unpatented articles from competitors of the patentee falls in the same class. Where unpatented articles are tied to the lease of a patented machine, the patent becomes a lever to compel those who may need or desire the patented machine not to buy from the lessor's competitors in selling the unpatented product. The effect of appellant's agreements, unlawful under the patent laws, was to prevent other producers from competing in the sale of unpatented salt for use in the patented machines. Such an agreement is comparable in effect to an agreement to boycott competitors, which is illegal *per se* under the antitrust laws. In the *Fashion Originators Guild* case, this Court affirmed the action of the Federal Trade Commission in refusing to hear evidence as to the "reasonableness" of the boycott of style "pirates", saying (312 U. S., at 468):

> * * * Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination.

The fact that the exclusion of a certain class of persons from the market is accomplished in the one case by a voluntary combination and in

the other by the possessor of a patent monopoly acting outside the scope of his patent grant is of no significance. As Judge Hand stated in the *Aluminum* case (148 F. 2d 416, 428):

> there can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition.

In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458, and again in *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 218, this Court stated:

> Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act *because they eliminate competition*, * * *. [Italics supplied.]

Agreements which require purchase of a commodity from a single producer "eliminate competition" even more clearly than does the fixing of prices. Those who agree upon prices may compete in other ways (*American Tobacco Co.* v. *United States*, 328 U. S. 781), but when goods must be purchased from a single supplier no competition remains at all. We might rest our argument on this point upon the excerpt from the *Carbice* opinion (quoted *supra*, p. 18) that limiting "the licensee to the use of unpatented materials purchased from the licensor is comparable to the attempt of the patentee to fix the price at

which the patented article may be resold". Since the price fixing is unlawful *per se*, so should be the "comparable" practice.

2. The "Rule of Reason" does not Protect Restrictions which have been held Contrary to Public Policy because of their Effect upon Competition

The "rule of reason" adopted in *Standard Oil Co.* v. *United States*, 221 U. S. 1, was designed to insure that the antitrust law would not be construed blindly so as to strike down acts which merely restrained trade in a literal sense, but only to reach those restraints which contravene "the public policy embodied in the statute" (221 U. S., at 64, 66). More specifically, this Court has stated that under the rule of reason "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or *whether it is such as may suppress or even destroy competition.*" *Chicago Board of Trade* v. *United States*, 246 U. S. 231, at 238. "* * * only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests by unduly restricting competition* or unduly obstructing the course of trade." *Nash* v. *United States*, 229 U. S. 373, 376; *Sugar Institute* v. *United States*, 297 U. S. 553, 598; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, and cases there cited. In other words the criterion under the rule of reason

is the effect upon the public interest in a competitive market. The cases in which this Court has held restraints not to be unreasonable are those in which it was of the view that competition would not be impaired or destroyed. See *Appalachian Coals, Inc.* v. *United States, supra; Chicago Board of Trade* v. *United States, supra; Window Glass Manufacturers* v. *United States,* 263 U. S. 403; *Maple Flooring Association* v. *United States,* 268 U. S. 563; *Standard Oil Co.* v. *United States,* 283 U. S. 163. Cf. *Sugar Institute* v. *United States,* 297 U. S. at 597–9.

It is manifest that when, as in this case, appellant's lessees agree to buy salt only from appellant, all competition in the sale of salt to them has been destroyed.[9] No competitor can enter the field which appellant has monopolized. Clearly, under the test enunciated in the cases applying the "rule of reason," restrictive covenants such as are here involved violate the law.

Since such expressions as "unreasonable" and "undue" do but little more than reflect conclusions based on other considerations, it is apparent

---

[9] Appellant has alleged that in fact licensees of its machines have purchased salt for use in the machines from other sources, and that appellant has not threatened to remove the machines because of this (R. 17). This means merely that appellant, doubtless aware of the futility of any such attempt in view of this Court's decisions in the *Carbice* line of cases, has not sought to enforce the restrictions which it placed in its license agreements. This does not make the restrictions any the less unlawful.

that the rule of reason requires the exercise of a quantitative judgment as to whether a restraint too greatly impairs the public interest in competition. Whatever difficulty this process may entail in other situations is not present here. For, even if it be assumed that the cases running from *Motion Picture Patents* to *Mercoid* (discussed *supra*, pp. 17–21) are not decisive authorities under the Sherman Act, interpreted most narrowly they refuse to enforce the restrictive agreements, or to help patentees who have imposed such agreements, precisely because the agreements are "contrary to public policy" (*Morton Salt* case, 314 U. S., at 494). And these decisions, which refer repeatedly to "public policy" and the "public interest" (*Morton Salt* case, p. 492, *Mercoid* cases, 320 U. S., at 665, 670, 684), also make it plain that the public policy referred to is the policy against monopoly and favoring competition except to the extent that a patentee is acting within the lawful bounds of his patent grant. See *Morton Salt* case, 314 U. S., at 491, quoted *supra*, pp. 19–20, and other cases discussed *supra*, pp. 17–20.

The public policy which prohibits abuse of the patent privilege through extension of the patent monopoly beyond the confines of the grant and the policy of the antitrust laws are obviously the same. The court below aptly stated in this connection, after quoting from the *Morton* case (R. 30–31):

> I am unable to bring to mind any public interest which the court could have had in

> contemplation other than the public interest in the maintenance of a system of free competition. The misconduct which disqualified the plaintiff in the *Morton* case from enforcing his patent right was interference with the system of free competition. True enough the disposition made by the court of the case rendered it unnecessary for it to consider whether the restraint upon trade was undue or unreasonable or whether the lessening of competition was substantial. But clearly a petty or merely nominal offense against the public interest would hardly justify the court in withholding its aid to the holder of the patent.

We think that the cases which hold this type of restriction to be "contrary to public policy," which means the policy against restraining competition, are dispositive of the argument that the restraint may be "reasonable" under the Sherman Act. If the policies underlying the Sherman Act and the cases refusing to afford judicial assistance to the extension of the patent monopoly are the same, a restriction can hardly be contrary to public policy (*Morton Salt* case, *supra*, p. 19), or subversive of public policy (*Mercoid* cases, 320 U. S., at 684), or prejudicial to "an important public interest" (*Mercoid*, p. 670), and yet reasonable under the Sherman Act.

3. The Miscellaneous Facts Stressed by Appellant Cannot Justify the Tying Clauses

Appellant argues that the facts alleged in its answer, which are admitted to be true for pur-

poses of the motion for summary judgment, raise an issue of fact as to the reasonableness of the restraint. We shall show that none of the facts upon which appellant relies is material, or sufficient to overcome the weight of the factors to which we have already referred.

(a) Appellant argues (Br. 30–31) that thirteen of the Lixator leases contain either no restrictions or less arduous restrictions than the others, and that it does not appear how much of the salt was sold to these lessees. But even if there had been nothing at all improper in thirteen out of over 900 leases, this would not be a defense. Nor does the answer allege or even imply that these thirteen machines used such a disproportionately large share of the 119,000 tons of salt sold to appellant's lessees as to affect the case in a material way. The obvious inference from the admitted facts, in the absence of anything explicit on the point, is to the contrary.

(b) Appellant objects (Br. p. 31) that there is no showing of the amount of salt sold by competitors to appellant's lessees. This also is immaterial.[10] Appellant is merely saying that the

[10] Nor is the quantity of salt sold by appellant's competitors important in other respects. See *United States* v. *Yellow Cab Co.*, No. 1035, 1946 Term, decided June 23, 1947; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. 2d 764, 765 (C. C. A. 6), in which the court said:

> The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined.

See p. 16, *supra*, 47–48 *infra*.

extent to which it enforced or failed to enforce its leases is one of the controlling factors in determining violation. But failure to enforce tying agreements gives no immunity and is no defense in an antitrust case, as was expressly held in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 458. The leases are on their face contracts "in restraint of trade". And it is not to be assumed from the allegation that "in many instances" (R. 17) lessees purchased salt from other sources that the contractual restraint was generally disregarded. Appellant has made no such allegation.

(c) Apparently for the purpose of showing that the restriction does not affect prices; appellant refers (Br. pp. 32–33) to the provisions in the Lixator agreement for a price reduction in case of a "general reduction" in prices, with the privilege of buying in the open market if appellant does not meet the general reduction, and to the provision in the Saltomat agreement that if there is "a general reduction in the Lessor's price" the lessee shall be given the benefit thereof. The Saltomat lease clearly does not provide for meeting a competitive price, and even as to the Lixator, the provision for meeting a "general reduction" does not establish effective price competition. But in any event the restriction here involved is unlawful because it serves to exclude competitors from the market whether or not it directly affects prices as well.

(d) Appellant urges (Br. p. 33) that it has not refused to install its machines because the lessees objected to signing the restrictive form, and that although "in many instances" licensees have purchased salt from other sources to appellant's knowledge, appellant has made no effort to enforce the restraint by removing the machines. But the fact that appellant has not imposed the restriction in all instances but only in a substantial number does not make it any the more reasonable or less restrictive (except in volume) of the competition of those who would otherwise have sold to the licensee. In *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 464, the Court specifically rejected the argument that the offer of "an alternative lease * * * free from the objectionable conditions" was a justification for the other leases.

Nor does the fact that appellant has not enforced the restriction when it was violated make a difference. In the first place the restriction in and of itself would impel most of the licensees who had agreed to it to comply without the need for enforcement. In the second place appellant must have known that any attempt to enforce would have been futile, in view of this Court's decisions. See cases cited *supra,* p. 17. Obviously, the cases holding such restrictions unenforceable because contrary to public policy, and thereby preventing appellant from instituting proceedings for enforcement, cannot serve as the

basis for an argument that tying clauses are not unreasonable under the Sherman Act.

As Judge Rifkind said in the *National Lead* case (63 F. Supp. 513, 526, affirmed June 23, 1947):

> But these contracts, being in restraint of trade and violative of the anti-trust laws, were never enforcible. If the non-enforcibility of the contract were to render an action under the anti-trust laws moot, we would face the absurd result that only innocent combinations would remain available for judicial scrutiny.

Furthermore, the *United Shoe Machinery* case, 258 U. S., at 458, in rejecting a similar contention, declared that "the fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act."

(e) Appellant argues (Br. pp. 34–36) that, because its salt contains a smaller percentage of impurities, the restrictive clauses of the leases are necessary for the satisfactory operation of the machines and the protection of appellant's good will. It is first necessary to analyze the record on this point. The portion of the record to which appellant refers does not establish that the machines will work only with appellant's salt. As to the rock salt used in the Lixator, appellant has averred in its answer (R. 17–18):

> * * * that the rock salt produced by other mining concerns does *not run con-*

> *sistent* in sodium chloride content and *in many instances* runs as low as 95% of sodium chloride. * * * If another salt *with a lower sodium chloride content and with more impurities* is used in such Lixator, it will require an alteration in the control of the sludge disposal, if the Lixator is to operate *in a satisfactory manner*, * * * [and] will affect adversely the amount of concentrated brine produced by the Lixator. [Italics supplied.]

As to the Saltomat it is alleged (R. 18) that salt with a minimum of calcium sulphate is superior, since that chemical impurity causes a hardening of the skin of canned vegetables. It is not alleged that other producers do not sell salt containing an equal proportion of calcium sulphate, but only that users of the machine will "have a more successful experience" if they use appellant's salt tablets (R. 18).

In addition, the answer must be read as a whole, and other allegations make it clear that salt produced by others can be used in the machines. For appellant has also averred that (R. 17):

> Moreover, in many instances lessees of the Lixator and of the Saltomat have purchased rock salt and salt tablets for use in such Lixator or Saltomat respectively from sources other than the defendant * * *.

Indeed the standard form of Lixator lease provides that if at any time there is a "general reduction in price of *grades of salt suitable* for use

in" the Lixator and the appellant fails or is unable to provide "a competitive grade" of salt at such price, the Lessee, upon continued payments of rental, "shall have the privilege of continued use of the said equipment with salt purchased in the open market." (R. 11.) Five of the Lixator leases permit the lessees to use their own salt, and three to buy 50 per cent of their salt requirements from appellant's competitors (R. 28, note 3). If defendant's allegations are read in their entirety and in the light of the undisputed provisions of the contracts, as they must be, they obviously do not mean that the machines will not work with salt produced by others, but, at most, that such salt is likely to be inferior to appellant's and that on the whole the machines will give more satisfactory service if appellant's salt is used."

The alleged harm which would result to appellant if its salt is not used consists of loss of good will, which obviously means the good will of the licensees themselves, inasmuch as the consuming public will not know whose machines or whose salt are used. A similar contention as to "tying clauses whose purpose and effect are to protect the good will of the lessor in the leased machines", was rejected in *International Busi-*

[11] This Court has wisely observed that "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price." *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27, 32n; *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 139.

ness Machines Corp. v. *United States*, 298 U. S. 131, 138–140, even though it was there stressed by the company that the failure of the cards used in the machines "even though occasional, to conform to these requirements, causes inaccuracies in the functioning of the machine, serious in their consequences and difficult to trace to their source, with consequent injury to the reputation of the machines and the good will of the lessors * * *" (298 U. S. at 139.) In meeting this contention the Court stated, in language equally applicable here (*id.*, at 139–140): "Appellant is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the necessary specifications, or even from making its leases conditional upon the use of cards which conform to them. For aught that appears such measures would protect its good will, without the creation of monopoly or resort to the suppression of competition."

Furthermore, any attempt to justify tying restrictions on good will grounds in situations where patents are involved, even if meritorious standing alone (which is not the case here), must be rejected on the grounds stated by this Court in *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. at 666: "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly." See *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498;

Radio Corp. v. *Lord*, 28 F. 2d 257, 260 (C. C. A. 3), certiorari denied, 278 U. S. 648; *Judson L. Thompson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952, 957 (C. C. A. 1), certiorari denied, 326 U. S. 776. However desirable it may be in the private interest of the patentee to protect his "good will", such desire cannot justify an act which is contrary to public policy, i. e., extension of the patent monopoly to cover unpatented materials.[12] It is up to the patentee to find some other less objectionable means of protecting his good will.

C. THE FACTS OF RECORD SHOW THAT THE RESTRAINT IS UNREASONABLE

The District Court found that, even if the type of restraint here involved was not unlawful *per se*, the undisputed facts of record were sufficient to show that the restraint was unreasonable.

Appellant admits that its business is interstate (R. 14, 15) and that it is the largest producer of salt for industrial use in the United States. In 1944 it sold approximately 119,000 tons of salt having an approximate value of $500,000, for use in the Lixator and Saltomat machines. At the time this action was before the District Court there were in effect 73 leases covering 96 Salto-

[12] Even the protection of the public health or quality of the product by a patentee has been held not to justify misuse of a patent. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459–460; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

mats, all in the standard form which requires the lessee to purchase all the salt tablets used in said Saltomats from appellant (Complaint, Appendix A; R. 11–12), and 840 leases, each covering one Lixator machine, 790 of which are in the standard form requiring the lessee to purchase all the rock salt used in said Lixators from appellant (Complaint, Appendix B; R. 12–13).[11]

Whether or not the type of restraint is unlawful *per se*, these facts show that appellant has excluded all other salt producers from competing for a large amount of business. By any test this is an "appreciable part" of commerce and is thus clearly sufficient upon which to base a violation of the Sherman Act. See the *Yellow Cab* case, p. 16 *supra*. The District Court declared in this connection (R. 32–33):

> The other is that a restraint which affects 900 business units in a business aggregating $500,000 per annum is, without more, undue and unreasonable, and the lessening of competition on its face substantial.
>
> * * * The intent and object of the Lixator and Saltomat leases were manifestly to exclude defendant's competitors from at least one portion of the business of the 900 lessees. * * *

[11] Of the 50 Lixator leases which vary from the standard form, in most instances the modifications are of little or no importance, all but four containing tying clauses requiring the purchase of some or all of the rock salt from appellant (see R. 28).

> Moreover, an analysis of the prices reflected in the 50 Lixator agreements which have been submitted, shows a nominal annual rental of $1 in 13 instances, and no rental other than "good and valuable consideration" in 3 instances. In all Saltomat leases there is provision that, after the lapse of five years, rental shall be at the nominal amount of $1. The same is true in all Lixator leases, with the exception of six instances. In these cases, therefore, the only valuable consideration which the lessor obtained is the lessee's promise to buy unpatented salt from the lessor. *In other words, the patent is being used solely to restrain competition.*

The use of a patent to restrain competition in this manner is clearly unlawful unless justified by circumstances showing the restraint not to be unreasonable. The circumstances upon which appellant relies are those discussed *supra,* pp. 34–41. For the reasons there set forth those facts do not justify appellant's conduct.

II

THE RESTRICTIVE AGREEMENTS ARE VIOLATIVE OF SECTION 3 OF THE CLAYTON ACT

Section 3 of the Clayton Act, so far as it is applicable to the present case, provides that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease * * * machinery * * * whether patented

or unpatented, for use * * * within the United States * * * on the condition * * * that the lessee * * * shall not use * * * supplies or other commodities of a competitor * * *, where the effect of such lease * * * or such condition * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appellant argues that its leases are not literally within the prohibition of Section 3 inasmuch as they do not prohibit the lessee from using salt purchased from competitors, but only from using such salt in appellant's machines. Practically identical contentions have been repeatedly rejected by this Court and the circuit courts of appeals. In the *International Business Machines* case, in meeting the same point, the Court stated (p. 135):

> Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition op-

erates in the manner forbidden by the statute."[14]

The *United Shoe Machinery* case emphasizes that it is the "practical effect of" the provisions, not their specific language, which determines whether the Clayton Act is violated. For decisions to the same effect in the lower courts see *Radio Corporation* v. *Lord*, 28 F. 2d 257, 261 (C. C. A. 3), certiorari denied, 278 U. S. 648; *Signode Steel Strapping Co.* v. *Federal Trade Comm.*, 132 F. 2d 48 (C. C. A. 4); *Judson L. Thompson Mfg. Co.* v. *Federal Trade Comm.*, 150 F. 2d 952, 955–956 (C. C. A. 1), certiorari denied, 326 U. S. 776. It is thus clear that the tying clause used in this case involves a type of restraint prohibited by Section 3.

Appellant's primary contention (brief, p. 18) seems to be that on this record Section 3 cannot be held applicable because there is a disputed issue of fact as to whether the leases "do not in fact substantially lessen competition or tend to create a monopoly in salt".

Section 3 requires only that the effect of the tying clause *"may be"* to substantially lessen competition or, that it *"may * * * tend* to create a monopoly". With appellant we accept the test as stated in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346–357, which

[14] In that case, as in this one, there was nothing to prevent the lessee from also leasing machines from other manufacturers and from using other cards in such machines.

emphasizes the word "may", but declares that "it was intended to prevent such agreements as would under the circumstances disclosed *probably* lessen competition, or create an actual *tendency* to monopoly", not "to reach every remote lessening of competition". Nevertheless even with this limitation, it is clear that the word *may* is to be given important effect and that actual proof of decreased competition or monopoly is unnecessary.

The agreed facts show that the tying clause in this case extends to over 900 machines, affecting 119,000 tons of salt, and that the appellant is the largest seller of salt for industrial uses in the United States. These facts certainly support the conclusion that the effect of the restriction would be "probably" to lessen competition or to create a tendency toward monopoly. On the face of the agreements it would seem clear that *all* competition in the sale of salt for use in the machines would be eliminated, and that appellant would completely monopolize it. Even if as alleged in appellant's affirmative defense (R. 16–19), some salt is sold by others for use in the machines, despite the agreements, it would still be unquestionable that the agreements lessened competition in a substantial sense and *tended* to create a monopoly, whether or not competition was completely destroyed and a monopoly created. It is significant that in the *United Shoe Machinery* case this Court stated (258 U. S., at 457) "that such restrictive and tying agreements must nec-

essarily lessen competition and tend to monopoly is, we believe, equally apparent."

Nor can it be urged that the quantity of commerce affected is insufficient to warrant application of the Clayton Act. 119,000 tons and a $500,000 business, carried on by the largest producer in the general field, is not insubstantial. Just as under the Sherman Act (see *Yellow Cab* case quoted, *supra,* p. 16), so under the Clayton Act it is sufficient that the restraint or monopoly relate only to a portion of an industry. Thus in *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.,* 83 F. 2d 764 (C. C. A. 6), the court held the Clayton Act violated by a company whose business totalled $325,000 out of a total industry of $66,000,000. The Circuit Court of Appeals there aptly stated (at 766):

> * * * Manifestly there may be monopoly of a defined subdivision of an industry, as of the industry itself. * * *
>
> The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined. * * * The defendant is possessed of patents. Such patents grant it a limited monopoly, limited as to time and as to the articles or processes precisely covered by the claims. Within such limitations its monopoly is exclusive and complete—there is no unoccupied area. * * * If we may assume,

> as we do, that monopoly of a defined portion of an industry is equally subject to the condemnation of the anti-trust laws as is a monopoly over an entire industry, then it requires in this case no statistical demonstration of monopolistic practices, for the patents themselves, which define the metes and bounds of the monopoly lawfully granted, likewise define the metes and bounds of the monopoly here sought and achieved by the assailed contracts. * * *

"If a dealer by such unfair trade practice as is here involved restrains competition with respect to his customers, he ought not be permitted to continue it because his portion of the national business is small; and we do not think that such was the intention of Congress in the requirement of the Clayton Act that the lessening of competition be substantial." *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48, 54 (C. C. A. 4); see also *Fashion Originators Guild* v. *Federal Trade Commission,* 114 F. 2d 80, 85 (C. C. A. 2), affirmed, 312 U. S. 457.

Even if it be assumed, as the trial court did assume (in the absence of anything in the record on the point), that there are other machines available to perform similar functions,[15] the result would be the same. Obviously the other machines would not be identical with appellant's, inasmuch as appellant's machines are patented. Presuma-

[15] See note 8, p. 26, *supra.*

bly appellant's lessees chose appellant's machines because they thought them preferable. Once they had made that choice, the tying clause prevents competition between those who would sell salt to them and appellant. The *International Business Machines* case involved a similar situation, inasmuch as it appeared that Remington Rand made competitive machines. The Court did not regard this fact as material.[16] The Clayton Act prohibits tying clauses in connection with unpatented as well as patented machinery, and with respect to the former there would frequently be competition with machinery produced by others.

III

PARAGRAPH VI OF THE JUDGMENT IS NECESSARY TO INSURE ADEQUATE RELIEF. THERE WAS NO ABUSE OF THE DISCRETION OF THE DISTRICT COURT

The appellant urges that, in any event, Paragraph VI[17] of the judgment (R. 38–39) should be

[16] The manufacturers of business machines had originally entered into an agreement not to compete with each other in the sale of tabulating cards, but had consented to a decree cancelling the agreement. 298 U. S., at 132. The Court did not treat this fact as of consequence in dealing with the merits of the case.

[17] Paragraph VI provides as follows:

> Defendant International Salt is directed to offer to lease or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph

modified or eliminated. It is our position that Paragraph VI in its present form is necessary to insure adequate relief and that its inclusion represents a proper exercise of discretion by the District Court. Paragraph VI printed in full in the note below, requires appellant to offer to lease, sell or license machinery covered by the patents here in issue on non-discriminatory terms, provided that machines are available, that appellant is offering to lease, sell or license them, that it need not dispose of or license the machines without cash payment or adequate security, and that

---

II hereof, to any applicant on non-discriminatory terms and conditions; provided that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

prices or royalty rates may differ as to different types and sizes of the machines and from time to time, so long as they are uniform at any one time as to each size and type. Persons now leasing machines are to have an election to retain the present arrangement or to enter into a new one under the paragraph.

The purpose of Paragraph VI was to prevent appellant from giving preference in the distribution of its machines to those who buy salt from it. The provision is positive relief designed to prevent appellant from using its ownership of the machines to force the purchase of its salt. Appellant has followed an illegal course of business in that regard for many years, and the trial court thought positive relief of this kind necessary to insure the future elimination of the unlawful practice. Such a provision is essential if the prohibition against the tying of the salt to the machines is to be made effective. A mere injunction against discrimination, such as appellant has proposed as an alternative, would not suffice, since it would require an inquiry into the motives of appellant in accepting or refusing applications for machines. The presence of a particular motive is not hard to conceal, and the enforcement of a general injunction against discrimination would be much more difficult if it necessitated an investigation into the motive behind the choice of customer and the terms in each case. The affirmative requirements of Paragraph VI are thus much sim-

pler for the trial court to supervise and police. They assure fair non-discriminatory treatment of existing lessees and of new applicants.[18]

Paragraph VI affirmatively requires the offering of machines on a non-discriminatory basis so long as appellant has and wishes to offer such machines for distribution, and subject to qualifications which protect appellant against disposal to bad credit risks and which allow differentiation between varying types and sizes. This does not harm appellant, since it permits appellant to decide whether it wishes to distribute machinery, and the price, so long as it treats all customers equally. No forfeiture or confiscation is involved. Appellant will receive compensation for a lease, sale or license of the machine. It merely protects present and future lessees, licensees or purchasers from abuse of appellant's position as lessor, licensor or vendor of the machine. The appellant is the largest producer of salt for industrial use in the United States. It has abused its patent rights. The public is entitled to protection against similar abuses in the future.

The judgment in an antitrust case must be moulded to the exigencies of the particular case. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 470, 474; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185. It should be de-

[18] The provision was included in the decree by the trial court as a less drastic alternative to the Government's request for compulsory licensing.

signed effectively to neutralize the continuing effects of the unlawful activity and prevent its recurrence. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308; *Standard Oil Company* v. *United States*, 221 U. S. 1, 77–78; *Local 167* v. *United States*, 291 U. S. 293, 299; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 726; *United States* v. *Crescent Amusement Co.*, *supra*. "It should be broad enough to prevent evasion," and any doubts should be resolved against the wrong-doers and in favor of those the Act seeks to protect. *Local 167* v. *United States*, *supra*, 299.

There is a wide range of discretion in the District Court, and where the findings of a violation of the antitrust laws are sustained, the Court will not direct a modification of the decree except on a showing of abuse of discretion. *United States* v. *Crescent Amusement Co.*, *supra*, 185. As this Court declared in *United States* v. *National Lead Co.*, No. 89, 1946 Term, decided June 23, 1947, in approving the "commendable fairness" with which the same District Judge as here had fashioned the decree in that case (p. 12), "the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective as possible."

Appellant complains (Br. p. 40) that in some sections of the country it might be necessary for

it to charge an unusually low rental in order to compete with other manufacturers, and that if it cannot reduce the rates to meet such competition, competition in those sections would be lessened rather than maintained. The District Court has power under Paragraph VIII of the decree to authorize appellant to deal with such a problem if it should arise.[19]

Appellant compares Paragraph VI to the provision in the *Hartford-Empire* decree, eliminated by this Court (323 U. S., at 412), which forbade any disposition or transfer by the defendant of patented glassware machinery other than by outright sale at reasonable prices to be approved, if necessary, by the court. But here appellant may sell, lease, or license, or refrain from doing so, and may fix its rates and prices pursuant to its own business judgment, subject to the sole limitation that it treat all customers equally. The provision in the *Hartford* decree was much more severe, and the reasons for its limitation by this Court thus have no relevance here.

Appellant also cites *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 728, wherein this Court refused to require defendant to sell its product

[19] If the need arose the Government would not oppose permitting appellant to charge a lower price in order to meet, in good faith, the equally low price of a competitor. Inasmuch as appellant retains the right to lower its prices uniformly, this contingency can only arise if appellant is faced with competition restricted to a particular section of the country.

without discrimination to any person offering to pay cash. In that case no patented commodity was involved and other manufacturers produced two-thirds of the total supply of the type of lenses in issue. 321 U. S., at 710. Potential customers thus had the option of obtaining the identical product from other sources. Clearly the decision in that case upholding the exercise of the discretion of the same district judge in refusing such a provision does not require this Court to hold that the court below in this case abused its discretion in providing a less drastic prohibition of discrimination.

Here appellant has a patented machine, not obtainable elsewhere, and, as there is no compulsory licensing, it may not be obtainable elsewhere until the patent expires. In the absence of an effective non-discriminatory provision, it may still be possible for appellant, if it so desires, to adopt a business practice which may enable it to use its patent position to give itself an unfair competitive advantage in the sale of salt. While it may avoid express imposition of the restrictions it has imposed in the past, it might still give sufficiently more favorable terms to those who buy its salt than to those who do not, as to defeat completely the purpose of the present decree. One of the effective safeguards against such actions would be a requirement that appellant license its patents, thereby enabling others to furnish the patented machines on fair terms if

appellant does not. The Government asked this as part of the decree, but the request was refused. Denial of that remedy leaves the non-discrimination provisions of Paragraph VI as the only practical protection to which one who desires to use appellant's machines, but not its salt, can look.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

ROBERT L. STERN,
JOHN C. STEDMAN,
Special Assistants to the Attorney General.

GEORGE L. DERR,
Special Attorney.

OCTOBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1947.

International Salt Company, Incorporated, Appellant, v. The United States of America.	Appeal from the District Court of the United States for the Southern District of New York.

[November 10, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

The Government brought this civil action to enjoin the International Salt Company, appellant here, from carrying out provisions of the leases of its patented machines to the effect that lessees would use therein only International's salt products. The restriction is alleged to violate § 1 of the Sherman Act,[1] and § 3 of the Clayton Act.[2] Upon appellant's answer and admissions of fact, the Government moved for summary judgment under Rule 56 of the Rules of Civil Procedure, upon the ground that no issue as to a material fact was presented and that, on the admissions, judgment followed as matter of law. Neither party submitted affidavits. Judgment was granted[3] and appeal was taken directly to this Court.[4]

It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, of which it is the country's largest producer for industrial uses. It also owns patents on two machines for utilization of salt products. One, the "Lixator," dissolves rock salt into a brine used in various industrial processes. The other, the "Saltomat," injects salt, in tab-

[1] 26 Stat. 209, § 1, 15 U. S. C. § 1.
[2] 28 Stat. 730, § 3, 15 U. S. C. § 14.
[3] 6 F. R. D. 302.
[4] Probable jurisdiction noted April 28, 1947.

let form, into canned products during the canning process. The principal distribution of each of these machines is under leases which, among other things, require the lessees to purchase from appellant all unpatented salt and salt tablets consumed in the leased machines.

Appellant had outstanding 790 leases of an equal number of "Lixators," all of which leases were on appellant's standard form containing the tying clause[5] and other standard provisions; of 50 other leases which somewhat varied the terms, all but 4 contained the tying clause. It also had in effect 73 leases of 96 "Saltomats," all containing the restrictive clause.[6] In 1944, appellant sold

---

[5] "It is further mutually agreed that the said Lixate Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, provided:

"If at any time during the term of this lease a general reduction in price of grade of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payments of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said Lessor shall furnish a suitable grade of salt at the said competitive price."

It further provides as follows:

"Should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirement of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 30 days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

[6] "It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the

approximately 119,000 tons of salt, for about $500,000, for use in these machines.

The appellant's patents confer a limited monopoly of the invention they reward. From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer no right to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the anti-trust laws. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680.

Appellant contends, however, that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, *per se*,

---

term of this lease; that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided: If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

The lease further provides:

". . . should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 10 days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, but also it is unreasonable, *per se*, to foreclose competitors from any substantial market. *Fashion Originators Guild* v. *Federal Trade Commission*, 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Appellant contends, however, that the "Lixator" contracts are saved from unreasonableness and from the tendency to monopoly because they provided that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price; and the "Saltomat" agreements provided that the lessee was entitled to the benefit of any general price reduction in lessor's salt tablets. The "Lixator" provision does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision. The "Saltomat" provision obviously has no effect of legal significance since it gives the lessee nothing more than a right to buy appellant's salt tablets at appellant's going price. All purchases must in any event be of appellant's product.

Appellant also urges that since under the leases it remained under an obligation to repair and maintain the machines, it was reasonable to confine their use to its own salt because its high quality assured satisfactory functioning and low maintenance cost. The appellant's rock salt is alleged to have an average sodium chloride content of 98.2%. Rock salt of other producers, it is said, "does not run consistent in sodium chloride content and in many instances runs as low as 95% of sodium chloride." This greater percentage of insoluble impurities allegedly disturbs the functioning of the "Lixator" machine. A somewhat similar claim is pleaded as to the "Saltomat."

Of course, a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. We may assume, as matter of argument, that if the "Lixator" functions best on rock salt of average sodium chloride content of 98.2%, the lessee might be required to use only salt meeting such a specification of quality. But it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except International. If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor. Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet. *Cf. International Business Machines Corp.* v. *United States*, 298 U. S. 131.

Appellant urges other objections to the summary judgment. The tying clause has not been insisted upon in all leases, nor has it always been enforced when it was included. But these facts do not justify the general use of the restriction which has been admitted here.

The appellant also strongly objects to the provisions of the sixth paragraph of the decree.[7] Appellant denies the necessity for such provision and it is true that the record discloses no threat to discriminate after the judgment of the Court is pronounced. It also suggests that we modify the judgment to accept a proposed alternative provision[8] similar to one it says it urged upon the District

[7] Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

[8] Defendant would be enjoined "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

Court, which rejected it. The record does not show what proceedings were had between rendering of the court's opinion and signing of the decree.

The specific ground of objection raised by appellant to paragraph sixth is that International may find it necessary in some sections of the country to reduce the rental rates of the machines in order that its machines may compete with those of others. Of course, the Clayton Act itself * permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose.

The short of the contention is that since the company never has threatened to violate any decree entered in this case to restrain future use of the illegal leases, it feels that the provision invalidating the objectionable leases should end the matter and that, as to any additional provisions, appellant is entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no farther than the violation or threat of violation. We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the

* 38 Stat. 730, 49 Stat. 1526, 15 U. S. C. § 13b.

purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.

The framing of decrees should take place in the District rather than in Appellate Courts.[10] They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *United States* v. *National Lead Co.*, — U. S. —. In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of "enabling any of the parties to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the judgment" and "for the amendment, modification or termina-

[10] That court is authorised, but not required, to call upon the Federal Trade Commission to assist in framing decrees in antitrust cases. § 7, Federal Trade Commission Act, 38 Stat. 722. This would seem unnecessary if Congress intended a simple prohibition of the particular practice proved before the court. It indicates the Congress has intended decrees to deal with the future economic condition of the enterprise as well as past violations.

tion of any of its provisions. . . ." We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below and deny the relief here, upon the present state of the record, without prejudice.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1947.

International Salt Company, Incorporated, Appellant, v. The United States of America.	Appeal from the District Court of the United States for the Southern District of New York.

[November 10, 1947.]

Mr. Justice Frankurter, whom Mr. Justice Reed and Mr. Justice Burton join, dissenting in part.

Agreeing wholeheartedly with the Court's opinion on the main issue, I am left unpersuaded by its justification for retaining Paragraph VI [1] in the judgment.

---

[1] VI

Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

(a) A machine or machines is or are available for such purposes and

(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph.

Inasmuch as the holder of patents on machines is not obliged to dispose of them to all comers or to do so at a uniform price, Paragraph VI in and of itself undoubtedly deprives appellant of a legal right. It is not merely a theoretical right. Practical considerations may make it important for appellant to act upon its legal right not to have a uniform price for all its customers. It was conceded at the bar that competition may require this. No doubt, when a court condemns practices as violative of the Sherman Law and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief. See *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Labor Board* v. *Express Publishing Company*, 312 U. S. 426, 435–37. Reflecting the dictates of fairness, equity does not put under ban that which is intrinsically legitimate unless for all practical purposes it is tied with the illegtimate, or the circumstances of the case makes it reasonable to assume that pursuit of what is legitimate would be a cover for doing what is forbidden.

The Government argues, in effect, that to compel appellant to observe uniformity of price for its machines removes any temptation for more favorable treatment of a customer who buys its salt. But that is precisely the aim of the main decree—it prohibits extension of the patent for the machines by requiring as a condition of its acquisition the purchase of non-patented salt. The presupposition of Paragraph VI is that the appellant will disobey that which the court explicitly forbids, so that the with-

drawal of an otherwise legal right to fix the purchase price of patented machines is employed as a precautionary screw to hold the appellant down from disobeying the court's decree. Surely a court of equity ought not to add to its prohibition of the illicit a prohibition of the licit unless the two are practically intertwined or there is some ground for believing that the licit will surreptitiously be misused in order to accomplish the illicit. There should be no such prohibition merely as a re-enforcement of the appropriate presupposition that a litigant, not shown to have been recalcitrant or underhanded, will obey the court's decree. If he does, the power of contempt is there to enforce obedience. It is suggested that if the presupposition of obedience is to be entertained it is unnecessary to enjoin even illegal conduct. But, surely, it is one thing to decree prohibition of conduct found to be illegal and a wholly different thing to add thereto the prohibition of that which is otherwise legal on the theory that thereby any temptation to persist in the forbidden illegality is removed.

Upon the record before us there is nothing to suggest that the appellant is likely to disobey the decree not only of the District Court against a continuance of illegal leases, but what in effect, upon affirmance, becomes a decree of this Court. It must be remembered that the Government saw fit to move for judgment on the pleadings. It thereby raised a pure legal question as to the validity of the leases on their face. The Government chose not to try to lay bare, as is often done in Sherman Law cases, fair and unfair practices inextricably blended. In such a situation the lawful has to fall with the unlawful. Having invited judgment on the bare bones of the pleadings which merely raise the validity of the tying clauses, the Government is not entitled to remedies which go beyond the justification of the pleadings. The Gov-

ernment ought not to have it both ways. The Government is not entitled to a provision in the decree which can be justified only on some indication in the record, of which here there is none, that appellant's past shows a devious temper which needs to be hobbled by withdrawing a conceded legal right.

In comparable situations, where orders of the Federal Trade Commission come here for review, this Court has sought to protect otherwise legitimate rights even where a business has indulged in unfair methods of competition. The Commission is not authorized to make its order needlessly destructive. The baby is not to be thrown out with the bath. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608. Accordingly, if this were a review of an order of the Federal Trade Commission, I should remit the order for appropriate reconsideration by the Commission. Since this is a review of a lower federal court and the record presumably presents to us all that was before the District Court in support of Paragraph VI, we could dispose of the matter here.

But the molding of decrees in Sherman Law cases is normally the business of district courts. They have a scope of discretion which should not unduly be cut off by a recasting of the decree on appeal here. (It is worth noting that the availability of the Federal Trade Commission in the role of a master in chancery to help mold decrees in suits under the anti-trust statutes apparently does not apply to a suit like the present, where judgment was asked on the pleadings and no testimony was taken. See § 7 of the Federal Trade Commission Act, 38 Stat. 717, 722, 15 U. S. C. § 47.) And so I would remand the case to the District Court. It has been suggested that Paragraph VI is merely a roundabout way of saying that the appellant should not discriminate in the price of its

patented machines in favor of a purchaser of its salt. If such was the intention of Paragraph VI, the District Court will want to convey such meaning less ambiguously.[2]

As the paragraph stands, I do not see how any lawyer would advise that the appellant could vary its prices among customers in different localities for a legitimate reason without each time going to the District Court for a modification of the decree. That is not a burden which, on this record, ought to be placed on the appellant. The undue sting of Paragraph VI is not saved by the fact that it is "specific." Of course it is in the interest of courts and of litigants that the terms of a decree be as specific as possible. But the desideratum of explicitness does not dispense with the requirement that remedies be appropriate to the condemned illegality. It does not draw the sting of undue prohibition of lawful conduct to make the prohibition specific.

[2] See the clause which the appellant proposed to the District Court, enjoining it "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."